proximity" as currently defined in Addendum A.

Failure by permittees to abide by measures in their SWPPPs to protect species and critical habitat would invalidate permit coverage. Attached to the proposed permits were instructions (Addendum A) to assist permit applicants in making this inquiry. The proposal indicated that a county-by-county species list would be included in Addendum A of the final permit to assist applicants in determining if listed species might be "in proximity" to storm water discharges and BMPs. EPA did not provide a draft species list in proposed Addendum A. Instead, EPA referred commenters to a similar species list that was used for an earlier EPA-issued storm water permit, the Multisector Storm Water General Permit, that was issued on September 29, 1995 (*see* 62 FR 29792, note 12, June 2, 1997).

C. Final CGP Conditions To Protect Listed Species

On April 28, 1997, EPA entered into formal consultation with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (the "Services") for issuance of the CGP. After discussions with the Services, EPA terminated formal consultation and entered into ESA section 7 informal consultation and conferencing with the Fish and Wildlife Service (FWS) and the National Fisheries Service Services (NMFS) on June 11, 1997. On November 4, and 26, 1997, EPA completed ESA informal consultation when NMFS and FWS provided their respective concurrences with EPA's finding that issuance of the CGP was not likely to adversely affect listed species or critical habitat. Based on that consultation and in consideration of comments received on the June 2, 1997, proposal, EPA has placed the following conditions in the permit to protect listed species and critical habitat (see Part I.B.3.e). Coverage under the CGP is available only if:

a. The storm water discharges and storm water discharge-related activities are not likely to adversely affect listed species or critical habitat (Part I.B.3.e.(2)(a)); or

b. Formal or informal consultation with the Services under section 7 of the Endangered Species Act (ESA) has been concluded which addresses the effects of the applicant's storm water discharges and storm water discharge-related activities on listed species and critical habitat and the consultation results in either a no jeopardy opinion or a written concurrence by the Service(s) on a finding that the applicant's storm water discharges and storm water discharge-related activities are not likely to adversely affect listed species or critical habitat. A section 7 consultation may occur in the context of another Federal on (*e.g.*, an ESA section 7 consultation was performed for issuance of a wetlands dredge and fill permit for the project, or as part of a National Environmental Policy Act [NEPA] review); or

c. The applicant's construction activities are covered by a permit under section 10 of the ESA and that permit addresses the effects of the applicant's storm water discharges and storm water discharge-related activities on listed species and critical habitat (Part I.B.3.e.(2)(c)); or

d. The applicant's storm water discharges and storm water discharge-related activities were already addressed in another operator's certification of eligibility under Part I.B.3.e.(2)(a), (b), or (c) which included the applicant's project area. By certifying eligibility under Part I.B.3.e.(2)(d), the applicant agrees to comply with any measures or controls upon which the other operator's certification under Part I.B.3.e.(2)(a), (b) or (c) was based.

The CGP requires that applicants consider effects to listed species and critical habitat when developing SWPPPs and require that those plans include measures, as appropriate, to protect those resources. Failure by permittees to abide by measures in the SWPPPs to protect species and critical habitat may invalidate permit coverage.

Addendum A contains instructions to assist permit applicants in making this inquiry. Those instructions require that applicants ascertain: (1) If their construction activities would occur in critical habitat; (2) whether listed species are in the project area; and (3) whether the applicant's storm water discharges and discharge-related activities are likely to adversely affect listed species or critical habitat. If adverse effects are likely, then applicants would have to meet one of the eligibility requirements of Part I.B.3.e.(2)(b)–(d) (paragraphs b., c., and d. above) to receive permit coverage. "Discharge-related activities" include activities which cause point source storm water pollutant discharges including but not limited to excavation, site development, and other surface disturbing activities, and measures to control, reduce or prevent storm water pollution including the siting, construction and operation of BMPs. The "project area" includes:

1. Area(s) on the construction site where storm water discharges originate and flow towards the point of discharge into the receiving waters (this includes the entire area or areas where excavation, site development, or other ground disturbance activities occur), and the immediate vicinity;

2. Area(s) where storm water discharges flow from the construction site to the point of discharge into receiving waters;

3. Area(s) where storm water from construction activities discharges into the receiving waters and the area(s) in the immediate vicinity of the point of discharge; and

4. Area(s) where storm water BMPs will be constructed and operated, including any area(s) where storm water flows to and from BMPs.

The project area will vary with the size and structure of the construction activity, the nature and quantity of the storm water discharges, the measures (including BMPs) to control storm water runoff, and the type of receiving waters.

Addendum A also contains a list of listed and proposed species organized by State and county to assist applicants in determining if further inquiry necessary as to whether listed species are present in the project area. This list is current as of September 1, 1997, and will be updated periodically and made available on the Office of Wastewater Management's website at "http://www.epa.gov/owm". CGP applicants can also get updated species information for their county by calling the appropriate FWS or NMFS office. EPA Region 2 applicants[5] can also contact the EPA Region 6 and Region 2 Storm Water Hotline (1–800–245–6510) for updated species information. Applicants from other EPA Regions can contact the appropriate EPA Regional storm water office for updated species information.

The CGP also requires that applicants comply with any conditions imposed under the eligibility requirements of Part I.B.3.e.(2)a., b., c., or d. above to remain eligible for coverage under this permit. Such conditions must be incorporated in the applicant's SWPPP. The CGP does not authorize any prohibited take (as defined under section 3 of the ESA and 50 CFR 17.3) of endangered or threatened species unless such takes are authorized under sections 7 or 10 of the ESA. The CGP does not authorize any storm water discharges or storm water discharge-related activities that are likely to jeopardize the continued existence of any species that are listed or proposed to be listed as endangered or threatened

[5] Region 2 permit areas include Indian Country lands in the State of New York and the Commonwealth of Puerto Rico.

under the ESA or result in the adverse modification or destruction of habitat that is designated or proposed to be designated as critical under the ESA.

It is EPA's intention to provide permit applicants with the greatest possible flexibility in meeting permit requirements for protecting listed species and critical habitat. Thus, EPA is allowing applicants to use either section 7 or section 10 ESA mechanisms to address situations where adverse effects are likely (see Part I.B.3.e.(2)(b) and (c)). Also, to give applicants additional flexibility in meeting the Part I.B.3.e. eligibility requirements and with the timing of informal consultations, the permit automatically designates CGP applicants as non-Federal representatives for the purpose of carrying out informal consultation. However, EPA notes that meeting ESA requirements raise difficult implementation issues on how to best ensure that the permits are protective of listed species and critical habitats without unduly burdening permit applicants, permittees, and State, local, and Federal governmental entities. Thus, EPA intends in the future to review those permit conditions and procedures that relate to the ESA and the protection of historic resources to see how well that goal has been achieved and may revise the permits if necessary to better achieve that goal.

VII. Historic Property Protection

A. Background

The National Historic Preservation Act of 1966, as amended, (NHPA) establishes a national historic preservation program for the identification and protection of historic properties and resources. Under the NHPA, identification of historic properties is coordinated by the State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs) or other Tribal Representatives (in the absence of a THPO). Section 106 of the NHPA requires Federal agencies to take into account the effects of their actions (also known as "Federal undertakings" in the NHPA regulations) on historic properties that are listed or eligible for listing on the National Register of Historic Places and to seek comments from an independent reviewing agency, the Advisory Council on Historic Preservation (ACHP). The permit was proposed with a number of conditions pertaining to the consideration of historic properties. EPA has decided to not include those conditions because the ACHP and the National Conference of State Historic Preservation Officers (NCSHPO) have requested that EPA not include such conditions in the final permit at this time. The ACHP and the NCSHPO have recommended that EPA issue the permit but recommend that EPA continue working with them and Tribes regarding the possible development of a more comprehensive and efficient approach to ensure that effects to historic properties are given appropriate consideration while ensuring undue burdens are not imposed on applicants and regulatory authorities. EPA plans to continue working with the ACHP, NCSHPO and Tribes on this effort and may modify the permit to incorporate procedures regarding the protection of historic resources at a later date.

B. Future CGP Conditions To Protect or Consider Effects to Historic Properties

In response to comments received on the proposal and because the Agency is still discussing historic preservation with the Advisory Council on Historic Preservation (ACHP), the final permit reserves permit requirements related to historic preservation. The permit does not currently include the eligibility restrictions and evaluation requirements from the proposed permit. After future discussions with the ACHP, EPA may modify the permit to reflect those discussions.

VIII. Summary of Responses to Comments on the Proposed Permit

The following is a summary of EPA's response to comments received on the proposed CGP which was published in the **Federal Register** on June 2, 1997 (62 FR 29786). Due to the large number of comments received, comments and responses have been categorized and placed into 10 major categories such as "Coverage of General Permits" and "Protection of Endangered Species."

Coverage of General Permits

Common Plan of Development or Sale

Many comments were received regarding permitting requirements for projects that are less than five acres but are part of a "larger common plan of development or sale ("Larger Common Plan") disturbing at least 5 acres." The volume and nature of the comments showed that the regulated community and the public needed additional guidance on this issue.

Under Phase I of the storm water program, an NPDES permit to discharge storm water associated with construction activity is only needed when a "common plan of development or sale" will disturb five or more acres. The simple case is when the "common plan" is to construct a single building, etc., for a single owner. The more complicated case needing clarification is when the common plan consists of several smaller construction projects that cumulatively will disturb five or more acres, but may or may not be under construction at the same time. Residential development with houses being built by several homebuilders in a master planned subdivision is an excellent example of this second case.

For illustration purposes, many examples in the explanation below assume a more complex residential development of single family homes with a developer putting in the infrastructure and common areas (*e.g.*, roads, sewers, parks, etc) and selling groups of lots to homebuilders and single lots to individuals. The same rationale used for these residential construction examples would apply to any project with multiple parts. For example, when building a new runway, the associated taxiways, and additional hangers, terminals, parking lots, etc., at an airport would be a common plan of development.

For sites disturbing less than five acres, the first steps in deciding if a permit is needed for storm water discharges associated with construction activity are determining:

1. Is there a "common plan of development or sale" tying individual sites together? (*e.g.*, Are the lots part of a subdivision plat filed with the local land use planning authority?) and

2. Will the total area disturbed by all of the individual sites add up to five or more acres? (*e.g.*, If you added up all of the acreage that will need to be disturbed to completely build out the subdivision as planned, would there be five or more acres disturbed?)

If the answer to both questions is no, a storm water discharge permit is not needed unless EPA determines that discharges contribute to a violation of water quality standards or are a significant contributor of pollutants to waters of the United States and specifically requests a permit application. This permit provides for coverage of such dischargers once designated.

Note: The disturbed acreage threshold may be less than five acres for Phase II of the storm water program. Proposed regulations for Phase II are expected December 1997 with final regulations due in March 1999.

The Larger Common Plan concept does have to be applied with some common sense and should not be taken to extremes. For example, every construction project within a city would not be considered part of a common plan of development just because the

city has a land use master plan or zoning map. EPA interprets the term more narrowly. Building a house on a vacant lot in a residential subdivision plat filed by a developer would be part of that subdivision's larger common plan of development or sale. Any earth disturbing activity necessary to complete the planned project (*e.g.*, grading lots, installation of utilities, building roads, preparing storm water control structures), plus various support activities such as exposed materials storage and equipment staging areas, are considered to be part of the construction activity that could result in a regulated discharge of storm water.

Once a residence has been completed and occupied by the homeowner (or tenant), future activities by the homeowner on their individual lot are not considered part of the original common plan of development (which was the industrial activity of building houses on each subdivided lot). After a home is occupied by the homeowner or a tenant, future construction activity on that particular lot is considered a new and distinct project and is compared to applicable disturbed acreage limits for permit applicability. For example, if homeowner decides to install a swimming pool after occupying the house, only the disturbed area on their lot—not the total acreage of the subdevelopment—is considered for determining whether a permit is needed. Likewise, demolition and reconstruction of individual houses originally built as part of a common plan of development, including those destroyed or damaged by fire or natural disasters, are also considered to be "new" plans of development/redevelopment, and not part of Larger Common Plan.

Once the extent of the Larger Common Plan has been determined, the total acreage to be disturbed must be calculated. A single ¼ acre lot is not large enough by itself to require a permit, but since 100 such lots in a subdivision would disturb 25 acres (if the entire area of each lot was disturbed), permit coverage is needed. Please note, permit coverage under the general permit is for all of the permittee's activities on the Larger Common Plan. Site-by-site permitting (*i.e.*, submitting a separate NOI and preparing a separate storm water pollution prevention plan for each individual lot) would negate one of the principle advantages of the general permit and is not required by EPA.

Of particular concern to many homebuilders is the issue of lots left over when the original development is substantially complete. It is EPA's position that the unbuilt lots remain part of the Larger Common Plan, but total disturbed acreage can be recalculated if: (1) All areas of the site achieve final stabilization or are turned over to a homeowner, and permit coverage is or could be terminated; and (2) the total remaining area of the Larger Common Plan is less than five acres. A permit is not necessary if the total acreage remaining to be built upon out of the Large Common Plan is less than five acres. On the other hand, if there were 22¼-acre lots left unbuilt (total 5½ acres), permit coverage would have to be obtained to build on even one of the remaining lots since the "common plan" would still be capable of disturbing more than five acres. Once three of these last ¼-acre lots were completed and stabilized, the total area remaining out of the original common plan with the potential to be disturbed would be only 4¾ acres.

EPA believes this approach maintains the intent of regulating projects that disturb five or more acres while applying common sense in interpreting the regulation. A common plan of development must at least be theoretically capable of having five or more acres of land disturbed at one time in order to trigger the need for a permit. Requiring that all parts of the project, including unbuilt portions of the Larger Common Plan of development, have achieved final stabilization before total disturbed acreage can be "recalculated" insures that there is a period of time during which all discharges of storm water associated with construction activity from the common plan of development or sale have ceased. The requirement to compare disturbed acreage to the total remaining unbuilt acreage of the Larger Common Plan protects against attempts to artifically divide a project in such a way as to avoid providing environmental controls for construction activities.

Support Activities

EPA received several comments requesting clarification on support activities eligible for, or required to obtain, permit coverage. As noted by many of these commenters, off-site areas are commonly used for storage of fill material or soil excavated from the construction site, borrow areas to obtain fill material, storage of building materials, concrete batch plants, or storage of construction equipment. Several citizens expressed concern that erosion and sediment from off-site areas used for storage or disposal of fill material were not being adequately controlled. A State highway department questioned whether a support base used for several nearby roadway projects would be eligible for coverage.

EPA agrees that where activities at off-site locations would not exist without the construction project, discharges of pollutants in storm water from these areas must be controlled. Changes have been made to part I.B. of the permit to clarify the permit and allow coverage for sites used by an operator to support several nearby projects. It remains the responsibility of the operator of the support area to assure permit coverage is obtained.

Off-site storage areas, support bases, disposal areas and borrow areas used for a construction project are considered to be part of the Larger Common Plan and must be addressed by the pollution prevention plan in certain instances. The pollution prevention plan for the construction project must include controls for all off-site areas directly supporting the construction project, unless the offsite location is a fixed base of operations (*e.g.* construction company's home office, warehouse, commerical warehouse, landfill, equipment yard, etc. used for all construction projects) or can be considered a stand-alone industrial or commercial activity serving multiple customers. Allowing such off-site locations to be permitted under the construction permit for the construction site avoids the need for a separate permit for the remote location.

Where the same operator uses a temporary off-site location to support construction activities at several nearby locations, permit coverage may be obtained by identifying the site and including controls for this common site in at least one of the pollution prevention plans for the individual construction projects. For example, a common support area for three highway projects could be permitted by identifying the site, including appropriate controls in at least one of the three pollution prevention plans for the separate projects, and insuring that an NOT is not submitted until the support area is finally stabilized.

Non-Storm Water

Several comments were received about the permit's authorization of non-storm water discharges. In response, this permit only authorizes the discharge of non-storm waters listed in Part III.A.3, and only when such discharges are identified in the storm water pollution prevention plan and appropriate controls are included. During the construction process, non-storm waters listed in Part III.A.3 are authorized for discharge either alone or when commingled with storm water. The

Agency also notes that EPA can request individual permit applications for such discharges where appropriate. The Agency is not requiring that flows from fire-fighting activities be identified in plans because of the emergency nature of such discharges and because of the unpredictability of their occurrence.

EPA would also like to clarify certain questions which were raised regarding the list of non-storm water discharges that are authorized. For example, operators were unclear whether dewatering of trenches is authorized under the permit. In response, EPA believes that discharges associated with the dewatering of trenches is the same type of water contemplated by the term "ground water dewatering." As such, EPA believes that this discharge would be authorized by the permit. Operators also asked whether discharges associated with dust control are authorized. In response, EPA would note that this discharge is specifically authorized by the permit.

Several commenters asked whether detergents would be allowed in discharges resulting from washing vehicles. In response to this issue, EPA believes that detergents should not be necessary to remove sediment from trucks which would be the primary purpose for washing vehicles at the construction site. The final permit was clarified to specify that truck wash water would only be allowed if detergents were not included in the discharge.

Wetlands

One commenter requested clarification between the section 402 NPDES and section 404 Dredge and Fill permitting programs. The NPDES and section 404 programs are implemented by EPA and the Department of the Army, respectively. Activities which involve the discharge of dredged or fill material into wetlands are regulated under section 404 of the CWA, which requires a permit from the Corps. However, construction activities (*i.e.*, clearing grading, and excavation) that result in storm water discharge into wetlands are regulated under the NPDES program and require a permit from EPA.

Several commenters expressed concern over the loss or degradation of wetlands and how their protection could be addressed in the construction general permit. Another commenter raised concern regarding the draining of wetlands and its adverse effect on fisheries under statistically expected drought conditions. EPA recognizes the commenters' concerns about construction activity impacts to wetlands. Because impacts to wetlands from dredged and fill material are already established and enforced under section 404 of the CWA. EPA is not incorporating any further language in today's permit regarding such requirements.

One commenter raised concerns about wetlands in proximity to the construction activity, which may receive drainage from the site. The commenter was concerned that such areas be considered under the general permit requirements. In response, EPA agrees to change the wording in Part IV.D.1.g. of the permit language from "areal extent of wetlands acreage at the site" to "an areal extent and description of acreage of wetland or other special aquatic sites (*i.e.*, 40 CFR 230.3(q-1)) at or near the site which will be disturbed, or receive water discharged from the disturbed areas of the site." EPA believes this language will help clarify this requirement in the site description of the storm water pollution prevention plan.

One commenter noted that a certain amount of sediment may be necessary to maintain the natural functioning of a wetland. The commenter expressed concern that under some circumstances, a construction project may result in decreases in the sediment load to a wetland. In response, EPA would note that the NPDES program requires permits for the discharge of pollutants from any point source into waters of the United States. By definition, wetlands are waters of the United States. As such, EPA must ensure that the discharges authorized by this permit comply with applicable water quality standards for the wetland, including requirements for sediment.

One commenter requested clarification on jurisdictional wetland areas coverage under today's permits. For the purposes of the CWA, wetlands are defined as areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions (33 CFR 328.3(b)). EPA uses the 1987 Corps of Engineers Wetlands Delineation Manual to identify and delineate wetlands. This document establishes the specific technical criteria that must be satisfied for an area to be considered a jurisdictional wetland. Therefore, storm water discharges from a construction activity to jurisdictional wetlands (*i.e.*, waters of the U.S.) need permit authorization and may be covered under today's permit.

Other commenters expressed concern regarding the effects on wetlands of the development of land for agricultural purposes. EPA would first point out that agricultural runoff is exempt from the NPDES permit program (See 40 CFR 122.3, CWA section 502 (14)). In addition, the development of land for agriculture is not considered a construction project regulated by the NPDES permit program.

Residential Construction

Many contractors and developers involved in residential development felt that the permit was geared towards large industrial facilities, and therefore not well suited to address small residential construction. These commenters generally either requested that residential construction be exempt from permitting, or that special consideration of the nature of residential construction be given in the permit.

There is no regulatory provision to exempt any construction activities based solely on the nature of what is being built. The disturbance of five or more acres in a Larger Common Plan defines industrial activity that requires a storm water discharge permit. The impact on water quality is not necessarily reduced because the construction project is residential and may, in some instances, proceed in a more piecemeal fashion. However, the Agency recognizes that there are certain differences in how residential development occurs, particularly with regard to completion of individual homes and occupation by either a homeowner or tenant. EPA has made several changes and clarifications of permit requirements to address the concerns of the residential development industry.

The definition of final stabilization has been changed. "Final Stabilization" in the final permit means either: (1) All soil disturbing activities at the site have been completed, and that a uniform (*e.g.*, evenly distributed, without large bare areas) perennial vegetative cover with a density of 70% of the native background vegetative cover for the area has been established on all unpaved areas and areas not covered by permanent structures, or equivalent permanent stabilization measures (such as the use of riprap, gabions, or geotextiles) have been employed. In some parts of the country, background native vegetation will cover less than 100% of the ground (*e.g.* arid areas). Establishing at least 70% of the natural cover of native vegetation meets the vegetative cover criteria for final stabilization. For example, if the native vegetation covers 50% of the ground,

70% of 50% would require 35% total cover for final stabilization; or (2) for individual lots in residential construction by either: (a) the homebuilder completing final stabilization as specified above, or (b) the homebuilder establishing temporary stabilization (including perimeter controls) for an individual lot prior to occupation of the home by the homeowner and informing the homeowner of the need for and benefits of final stabilization. EPA strongly recommends that homeowners stabilize as soon as practicable. (Homeowners have a personal incentive to put in landscaping functionally equivalent to final stabilization as quick as possible to keep mud out of their house and off their sidewalks and driveway.)

Installation of Utility Service Lines

The proposed permit attempted to more clearly define the role of utility companies whose sole involvement in a construction project was installation of utility service lines. Many utility companies challenged EPA's assertion that they represented a special class of operator at construction sites and pointed out potential financial and project delay impacts of requiring utility companies to obtain permit coverage before installing utility service lines at a project. Other commenters felt that utility companies should be held accountable for their actions on-site and for disturbing any storm water control measures installed by other site operators. In general, utility companies agreed that they are responsible for their actions on-site, but did not believe they should be considered "operators" and required to obtain permit coverage. Several commenters felt utility companies should be treated as subcontractors and the party requesting utility service should be the permittee.

In response, EPA agrees that in many areas utility companies will not meet the definition of operator while installing utility service lines (the draft permit implied that a utility company would always be an operator when installing utility service lines). As with any other party involved in a construction project, permit coverage will only be required for utility companies when they met the definition of "operator." The definition of operator in the final permit, though changed slightly from the proposed permit for better clarity, applies to parties at a construction project which meet either of the following two criteria: (1) A party with operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or (2) a party with day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan (SWPPP) for the site or other permit conditions (*e.g.*, they are authorized to direct workers at the site to carry out activities required by the storm water pollution prevention plan or comply with other permit conditions). To determine if a utility company meets either criterion, a review of the word "control" with regard to construction plans and specifications and day-to-day operations is needed.

In the definition of "operator," it is not EPA's intention to include those parties whose function is to assure that a project complies with previously established standards (*e.g.*, national, state or municipal). For example, design or installation standards set by municipalities or utilities which are based on national standards such as the National Electric Code does not give the municipality or utility "control" over a construction project's plans and specifications, but instead directs or limits a project operator's latitude when drafting or modifying a particular aspect of the project's plans and specifications. Furthermore, reviewing or applying such standards (*e.g.*, residential electric lines must be capable of carrying a specific voltage, made of certain materials, buried a certain depth) does not make a utility or municipality meet the first criterion of the definition of "operator." Also, utility companies will often not meet the second criterion of the definition because they are not responsible for overall SWPPP compliance at a project. Typically, a project's general contractor has overall responsibility for SWPPP implementation and compliance.

To the extent that a utility company needs to develop its own site-specific plans and specifications for a service installation at a project requiring storm water permit coverage, the utility will be considered to meet the definition of "operator" and must allow for appropriate storm water control measures either by designing and implementing controls themselves, or by assuring that another project operator has designed and will implement storm water controls for the area disturbed by the utility service installation. In all cases, to ensure effective implementation of storm water pollution control measures, EPA stresses the importance of cooperative efforts by all parties involved at a construction site, including those not meeting the definition of "operator," to understand and abide by SWPPP provisions which their activities will impact.

Other examples of where a service line installation would require construction storm water permit coverage would be if the activity disturbed five or more acres (40 CFR 122.26(b)(14)(x)), or was designated by the Director to obtain coverage for another reason (40 CFR 122.26(a)(1)(v), 122.26(a)(9) or 122.26(g)(1)(i)). See Part I.B.1. of the permit for further details on eligibility. Other utility company activities, such as the installation of main transmission lines, should likewise be reviewed to see if permit coverage is required.

After considering the comments from the utility companies, the proposed area-wide NOI option and SWPPP certification statement for utility companies in the proposed permit were deleted in the final permit. Utility companies were generally uncomfortable with even the limited requirements of the area-wide NOI since the actual construction projects where they would be working would not be known at the time of the NOI submittal. The certification statement is no longer necessary since measures to address utility service line installations no longer require the statement to assign responsibility from the utility company to another project operator. In addition, based on the comments from the utility companies, the frequency of the situations in which a utility would be considered an operator may be significantly less than EPA had thought. Hence, there may not be a pressing need for the proposed streamlined permitting option.

Construction in Cold Climates

Several comments were received suggesting changes to the construction general permit to accommodate cold weather oil and gas issues or questioning the effectiveness and requirement for storm water pollution prevention plans for North Slope oil and gas facilities in Alaska. Specifically, commenters were questioning the need for, and appropriateness of, the permit for gravel pad construction on the North Slope during frozen conditions. It was stated that construction activities only occur during the cold months because access is facilitated by frozen permafrost conditions. When the North Slope is in a thawing condition it is essentially a wetland, which makes overland access activities difficult as well as very disruptive to the ecology. Commenters expressed concern that gravel pads might be required to establish 70% vegetative cover prior to submitting the NOT.

With regards to the need for a storm water discharge permit, EPA points out that the definition of storm water at 40 CFR 122.26(b)(13) includes snow melt runoff. As such, EPA believes that construction which occurs during frozen conditions still needs a storm water permit since the snow will eventually melt and be discharged.

Construction activity which involves depositing gravel fill directly into wetlands is regulated under section 404 of the CWA which is administered by the US Army Corps of Engineers (COE). COE section 404 permits all require CWA section 401 certification providing assurance that if the construction activity is in compliance with the COE 404 permit, there will be no water quality standard violations.

Once the gravel pads are constructed, it is reasonable to consider them as permanent structures since their surface will be used to conduct oil and gas activities. Therefore remediation of the pad itself (70% restoration of vegetative cover) is not appropriate at the end of the construction sequence. Storm water permitting may be required, however, for the operational phase of the pad activities as well as gravel extraction activities.

Other comments regarding cold weather issues in Alaska pertained to the remoteness of sites that would need to be permitted and inspected. Commenters were concerned that accessing such remote sites is not easily accomplished, and overly burdensome. In response, EPA has included a special provision in Part IV.D.4 of the final permit to provide a waiver of the inspection requirements when the ground would be expected to be frozen for an extended period of time. Inspections would be required to begin one month prior to when thawing conditions are expected to begin.

Compliance With Water Quality Standards

Several comments objected to the inclusion of permit eligibility and discharge compliance requirements related to water quality standards (WQS). EPA is obligated under CWA section 402(p)(3) to ensure that all permits for discharges associated with industrial activity (which includes storm water discharges from construction sites of five acres or more) shall meet all applicable provisions of CWA section 301.

CWA section 301(a) states that discharges shall be unlawful unless in compliance with sections 301, 302, 306, 307, 318, 402, and 404 of the Act. Section 301 provides that discharge permits must include effluent limitations necessary to assure that discharges comply with State or Tribal WQS. Effluent limitations do not have to be numeric, especially in cases where numeric limitations are currently infeasible. In such cases, EPA may require the use of best mangement practices (BMPs) including more sophisticated forms of treatment in permits to satisfy the CWA's requirements for "any more stringent limitations as necessary to meet State WQS."

If a discharge is found to be violating a water quality standard, EPA can require that the discharge be covered by an individual permit, which may include more stringent controls or numeric effluent limitations developed to ensure compliance with WQS. The development of the effluent limitations would be dependent upon adequate characterization of the discharges and the individual permit could also include monitoring requirements.

Some commenters were concerned that compliance with WQS is not possible in some situations and therefore WQS compliance should be waived. As stated above, compliance with water quality standards is a requirement of the CWA as implemented through the NPDES permitting program. EPA can not waive the requirements of the CWA. If the permittee feels that the WQS to which they must comply are too stringent or the cost of that compliance is too high, several avenues of relief can be sought. The permittee may seek changes of WQS through a use attainability analysis, the development of site specific criteria, or short term WQS variances. All of these avenues must be pursued through consultation with the applicable State or Tribal environmental agency and are subject to EPA review.

If the permittee is not able to comply with WQS as a result of the implementation of a certain set of BMPs, EPA recommends installing more effective BMPs or additional BMPs to assure compliance with WQS. If this effort results in discharges which continue to violate WQS, EPA recommends that the facility cease discharging, apply for an individual permit, or pursue one of the options listed above to change the WQS. (See also EPA's memorandum of August 1, 1996, entitled "Interim Permitting Approach for Water Quality-Based Effluent Limitations for Storm Water Discharges.")

EPA received several comments regarding salt intrusion to groundwater discharges that might exceed standards established by the State. One commenter suggested that the final permit include an affirmative statement to specify that, in developing and implementing storm water pollution prevention plans, permittees are not required to remove remove constituents that are not added by the construction project or related activities. In response, EPA notes that Clean Water Act section 301(b)(1)(C) requires that NPDES permits include any more stringent limitation including those necessary to meet water quality standards. The CWA does not, however, regulate releases of polluants to groundwater unless there is a direct hydrological connection between a point source and surface waters of the United States through such groundwater. Therefore, the commenter's recommendations were not included in the final permit.

The California Department of Transportation recommended that the general permit incorporate language similar to that developed by the State by California for its general industrial storm water permit. However, EPA has recently expressed concerns to the State regarding the language in question and is currently working with all stakeholders in California on alternative language. Since EPA believes that the language as written is not appropriate it was not incorporated into the final permit.

Another commenter contended that Part III.D of the draft permit (compliance with water quality standards) was too weak. The commenter recommended that the permit also require remedial actions by permittees to correct any damage that may result from the discharges not in compliance with the permit.

EPA disagrees with the commenter that the language addressing water quality standards compliance needs to be strengthened. A wide variety of enforcement responses are available to the Agency for discharges which violate the terms of the permit, including requirements for remediation of environmental damage caused by the discharges. As such, the requested modifications were not incorporated into the final permit.

Protection of Endangered Species

A large number of comments were received regarding provisions in the permit to protect listed species and critical habitats. For reading convenience, similar comments have been grouped together for response and are listed below in items A through V.

(A) A number of commenters have expressed the belief that the Clean Water Act (CWA) does not allow EPA to place conditions in National Pollutant Discharge Elimination System (NPDES)

permits to protect listed species and critical habitat. They believe that requirements to protect listed species have no relation to the CWA's goal of protecting water quality. These commenters have requested that EPA remove those permit conditions or provide a legal justification as to why they should be included.

EPA declines to remove these provisions because the Agency believes that conditions to protect listed species and critical habitat are appropriate for Federally-issued NPDES permits such as the CGP given the requirements placed on them by sections 7(a)(1), 7(a)(2), and 9 of the ESA. By placing ESA requirements on Federal agencies and their actions, Congress intended that Federal permits could contain conditions to protect listed species and critical habitat. ESA regulations at 50 CFR 402.02 define an "action" subject to section 7 to include "permits," and EPA first recognized the applicability of ESA section 7 to the Federal NPDES program in 1979, when it promulgated regulations listing the ESA as a Federal law which may apply to EPA-issued permits. *See* 44 CFR 32917 (June 7, 1979). EPA's current regulations at 40 CFR 122.49(c) [6] and 122.43(a) [7] require that EPA adopt or consider the adoption of permit conditions to comply with ESA requirements.

Finally, EPA notes that the primary goal of the CWA is the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. This includes the attainment of water quality that provides for the protection and propagation of fish, shellfish, wildlife. See 33 U.S.C. 1251. These goals include the protection of listed and other at-risk species.

(B) Other commenters have characterized the ESA as a new environmental law that permit applicants are being required to certify under. EPA does not believe that the ESA is a new environmental law because it has been listed in EPA's regulations since 1979 as a statute which may apply to the issuance of NPDES permits by EPA.

(C) Some commenters have objected to measures to protect species and critical habitat in the proposed permit as an impermissible delegation of EPA's section 7 consultation responsibilities to the permit applicant.

EPA recognizes that as the action Federal agency, it bears the ultimate responsibility for compliance with section 7 of the ESA for issuance of the CGP. It is not abrogating that responsibility. However, given the CGP's potential coverage of over 13,000 construction activities per year that are scattered across eight States and numerous other Federal permitting jurisdictions, it is essential that permit applicants and permittees consider the effects of their particular actions on listed species and critical habitat, and to take measures to protect those resources, if EPA is to ensure that issuance and operation of the CGP is not likely to adversely affect listed species and critical habitat.

As noted above, EPA believes that under the CWA and the ESA, it is appropriate for NPDES permits to require that applicants and permittees take measures to protect listed species. EPA also believes that such conditions should require that applicants consider the potential and actual effects of their actions on listed species and critical habitat. Storm water general permits place substantial responsibilities on permit applicants and permittees to ensure that their storm water discharges are protective of the environment. This includes the development of information (as part of the NOI and SWPPP development process) to ensure compliance with permit requirements. The ESA regulations clearly allow for permit applicants to develop and collect information on the effects of their proposed actions on listed species and critical habitat.[8] Those regulations also provide that applicants can conduct informal consultation as non-Federal Representatives (NFRs). *see* 50 CFR 402.08.

The conditions being established by EPA through ESA section 7 consultation to protect listed species and critical habitat are designed to focus EPA, Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS) resources on those permitted activities that merit a site-specific ESA section 7 consultation or section 10 permit. Where a site-specific section 7 consultation is appropriate, the CGP allows for either informal consultation (with the applicant having NFR status) or for formal consultation. EPA is prepared to conduct site-specific consultations where necessary to ensure that permitted activities are protective of listed species. However, given the large number of expected applicants and limits on EPA's resources, it is faster and more efficient for the bulk of these consultations to be carried out as informal consultations with permit applicants as non-Federal representatives.

Finally, EPA notes that it has completed section 7 consultation and conferencing for issuance and operation of the CGP and that the FWS and the NMFS (the "Services") have concurred with the approach taken in the permits and with EPA's finding that the issuance and operation of the CGP is not likely to result in adverse effects to listed species and critical habitat.

(D) Some commenters have also noted that shifting the burden for carrying out consultation will result in administrative difficulties for the Services. EPA coordinated development of the CGP with the Services and notes that the CGP conditions are designed to reduce the number of site specific consultations to those actions where adverse effects may be likely. However, it is possible that a large number of site-specific consultations will be performed for activities covered by the CGP.

(E) A number of commenters were concerned that these conditions will be difficult to comply with. Specifically, commenters were concerned that information on listed species and critical habitat will be hard to obtain. They have asked that EPA make species lists, critical habitat, and other information readily available to the public. Some commenters have asked that this information be placed in the permit or on the Internet. They have noted that many permit applicants will not know how to comply with these requirements. Some commenters have also requested that EPA ensure that any ESA guidance remain in the final permit document.

EPA has worked closely with the Services to give the greatest flexibility to permittees in complying with

[6] The pertinent portions of 40 CFR 122.49 read as follows: Considerations under Federal law. The following is a list of Federal laws that may apply to the issuance of permits under these rules. When any of these laws is applicable, its procedures must be followed. *When the applicable law requires consideration or adoption of particular permit conditions or requires the denial of a permit, those requirements also must be followed.* * * * (c) The Endangered Species Act, 16 U.S.C. 1531 *et seq.* section 7 of the Act and implementing regulations (50 CFR part 402) require the Regional Administrator to ensure, in consultation with the Secretary of the Interior or Commerce, that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat. (Emphasis added).

[7] 40 CFR 122.43(a) states: "In addition to conditions required in all permits (122.41 and 122.42), the Director shall establish *conditions*, as required on a case-by case basis, to provide for and assure compliance with all applicable requirements of CWA and regulations. These shall include conditions under 122.46 (duration of permits), 122.47(a) (schedules of compliance), 122.48 (monitoring), and for EPA permits only 122.47(b) (alternates schedule of compliance) and *122.49 (considerations under Federal law).*" (Emphasis added.)

[8] Applicants are listed throughout the ESA consultation regulations and preambles as involved parties in the consultation process.

requirements to protect listed species and critical habitat. While EPA realizes that fulfilling some CGP requirements to protect listed species and critical habitat may seem difficult to some applicants, the procedures to meet those requirements are similar to those already undertaken by many developers and contractors to obtain ESA section 10 permits for protection from incidental takes liability. As noted above, the CGP allows applicants to use section 10 permits to meet permit eligibility requirements.

There is much information on listed species and designated critical habitat that is publicly available. Lists of endangered and threatened species are published by the Fish and Wildlife Service and the National Marine Fisheries Service and can be found in 50 CFR 17 of the Code of Federal Regulations (CFRs). The CFRs are widely available and can be found in many libraries or law libraries. Copies of the CFRs can also be ordered from the Government Printing Office which maintains a number of book stores throughout the country [9] or they can be accessed for free at the GPO Website (http://www.access.gpo.gov/nara/cfr/index.htm).

The Services also maintain electronic copies of these lists at their respective World Wide Web sites. Lists of species under the FWS jurisdiction can be accessed at the Endangered Species Home Page (http://www.fws.gov/~r9endspp/endspp.html) (which is also attached to the FWS Home Page (http://www.fws.gov) in the "Nationwide Activities Category"). Lists of species under NMFS jurisdiction can be found on the NMFS Homepage (http://www.nmfs.gov) under the "Protected Resources Program." Lists and maps of critical habitat can be found in the Code of Federal Regulations at 50 CFR 17 and 226.

Also, information on listed species and critical habitat can also be obtained by contacting the FWS and NMFS offices or by contacting the Biodiversity Heritage Centers of the Natural Heritage Network. The FWS has offices in every State. NMFS has offices in certain States. A list of NMFS and FWS office addresses is provided in Addendum A of the permit. The Natural Heritage Network comprises 85 biodiversity data centers throughout the Western Hemisphere.

These centers collect, organize, and share data relating to endangered and threatened species and habitat. The network was developed to promote informed land-use decisions by developers, corporations, conservationists, and government agencies, and is also consulted for research and educational purposes. The centers maintain a Natural Heritage Network Control Server Website (http://www.heritage.tnc.org) which provides website and other access to a large number of specific biodiversity centers. A list of biodiversity center addresses is provided in Addendum A of the CGP.

Addendum A also contains a list by county of all species in areas covered by the CGP that are listed as endangered and threatened ("listed species") or proposed for listing as endangered and threatened ("proposed species"). This list is current as of September 1, 1997. Because the status of species and counties will change over time, EPA will periodically update the county list and make it electronically available on the EPA's website. CGP applicants can get updated species information for their county by calling the appropriate Fish and Wildlife Service office or National Marine Fisheries Service office. EPA Region 2 applicants [10] can also contact the EPA Region 6 and Region 2 Storm Water Hotline (1-800-245-6510) for updated species information. Applicants from other EPA Regions can contact the appropriate EPA Regional Office for updated species information.

Finally, EPA has worked with the Services to expand Addendum A to provide more guidance on how meet the permit eligibility requirements and to protect listed species. There are also a number of guidance documents produced by the Fish and Wildlife Service and the National Marine Fisheries Service to assist the public in meeting ESA requirements. Many of those documents are electronically available on the Services" Internet sites.

(F) Some commenters have requested that EPA publicly notice any species to be included in the final county species list that were not found in the Addendum H of the Multi-Sector General Permit issued on September 29, 1995 (60 FR 50804). EPA declines to take this action because it believes sufficient public notice was provided in the proposal when EPA referred reviewers to the Multi-Sector General Permit's Addendum H list (62 FR 29791, footnote #12 (June 2, 1997)), which contains similar species on a county basis to that contained in Addendum A of the CGP. Furthermore, EPA notes that all of the proposed and listed species found on both Addendum A of the CGP and Addendum H of the Multi-Sector General Permit already have undergone public notice as part of the ESA listing process.

(G) Some commenters have noted that the Addendum A species list may not remain current in light of new species listings. As noted above, EPA is planning to provide regular updates of the list and to make it available to permit applicants.

(H) Commenters have also expressed concerns with the timing of this process. They have noted that once a project has reached the construction stage, there is not enough time to take action to protect listed species. EPA encourages permit applicants to analyze effects to listed species and critical habitat at the earliest possible stage. EPA has required applicants to analyze impacts to species when developing storm water pollution prevention plans (SWPPPs) prior to submitting NOIs. However, applicants may choose to conduct this review at an even earlier time. Any conditions to protect species and critical habitat must be incorporated into the SWPPP.

(I) EPA solicited comments on whether the scope of effects to listed species and critical habitat to be considered by permit applicants should encompass the entire construction site. A number of commenters supported this expansion. Some commenters did not think there was anything to be gained by broadening the scope of the area to include the entire site. Other commenters did not believe that storm water regulation extended to land areas unaffected by either storm water discharges or best management practices (BMPs).

EPA has revised its permit conditions and Addendum A instructions to require that permit applicants consider the effects of "storm water discharges and storm water discharge-related activities" on listed endangered and threatened species and critical habitat within the "project area." The terms "storm water discharge and storm water discharge-related activities" replaces the terms "storm water discharges and construction and implementation of best management practices" used in the proposal. "Discharge-related activities" include (1) activities which cause point source storm water pollutant discharges including but not limited to excavation, site development, and other surface disturbing activities, and (2) measures to

[9] GPO bookstores are located in Atlanta, GA; Birmingham, AL; Boston, MA; Chicago IL; Cleveland, OH; Columbus, OH; Dallas, TX; Denver, CO; Detroit MI; Houston TX; Jacksonville, FL; Kansas City, MO; Laurel, MD; Los Angeles, CA; Milwaukee, WI; New York, NY; Philadelphia, PA; Pittsburgh, PA; Portland, OR; Pueblo, CO; San Francisco, CA; Seattle, WA; and Washington, DC.

[10] Region 2 permit areas include Indian Country lands in the State of New York and the Commonwealth of Puerto Rico.

control, reduce, or prevent storm water pollution including the siting, construction, and operation of BMPs. This revision expands the scope of effects that should be considered for listed species when compared to the proposed permit. The term "project area" now replaces the proposed term, "in proximity to." The "project area" includes: areas on the construction site where storm water discharges originate and flow towards the point of discharge into the receiving waters (this includes all areas where excavation, site development, or other ground disturbance activities occur), and the immediate vicinity; areas where storm water discharges flow from the construction site to the point of discharge into receiving waters; areas where storm water from construction activities discharges into the receiving waters; areas in the immediate vicinity of the point of discharge; and areas where storm water BMPs will be constructed and operated, including any areas where storm water flows to and from BMPs.

EPA anticipates that the project area will vary from site-to-site depending on the size and structure of the construction activity, the nature and quantity of the storm water discharges, the measures (including BMPs) to control storm water runoff, and the type of receiving waters. In many cases, the project area will encompass an entire construction site. However, there could be situations where project area may encompass a portion of the site (for example, where the actual construction disturbs only a portion of a land development project). EPA believes the revised scope of the permit is more consistent with the definitions of "effect" and "action area" found in the ESA regulations and affords better protection for listed species and critical habitat while ensuring that CGP storm water controls are not extended into areas that bear no relation to the discharge of polluted storm water.

Some commenters believe the scope of effects of the permit is too narrow. In particular, they believe that the scope should encompass areas farther downstream than what was proposed in the permit, which directed permit applicants to consider effects to listed species and critical habitat in the immediate vicinity or nearby the point of discharge. EPA declines to expand this scope beyond what was proposed because the proposed (defining "in proximity") and final permit language (defining "project area") allow for a flexible determination of effects which can extend further downstream depending on the circumstances surrounding each discharge. Those circumstances vary with the size and structure of the construction activity, the nature and quantity of the storm water discharges, the measures (including BMPs) to control storm water runoff, and the type of receiving waters. Also, the CGP does not authorize any discharges that would cause or contribute to a violation of water quality standards. Water quality standards are designed to be protective of use of the water, including aquatic life and consequently, listed species. Moreover, under the CWA, any discharge must not only ensure compliance with the water quality standards of the water where the discharge is located, but also any downstream water quality standards. Thus, the scope of the inquiry under this permit is not so narrow as this commenter suggests. EPA believes that any downstream water quality impacts associated with discharges of stormwater under this permit will be adequately accounted for.

Commenters have also requested that EPA consider or require that applicants consider effects to listed species from storm water contamination that enters into groundwater which then enters into surface waters where those species are found.

EPA believes it is providing for the consideration of effects from discharges to hydrologically connected groundwater. EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection ("hydrologically connected") between the groundwater and the surface water. However, EPA also believes that this use of NPDES permits is highly dependent on the facts surrounding each permitting situation. CGP coverage can extend to discharges to surface water via hydrologically connected groundwater and CGP applicants, like any other NPDES applicant, should consider those types of discharges when applying for permit coverage. However, these discharges may at times be better suited for individual permits, and EPA may require that applicants obtain an individual permits as provided at Part VI.L. of the CGP and in 40 CFR 122.28(b)(3) of EPA's general permit regulations. Permit applicants and the interested people can also petition EPA under those provisions to require coverage by an individual permit.

(J) A number of commenters have questioned why there is a need to have specific conditions in the permit to protect listed species and critical habitat when there are other laws or procedures which accomplish the same goal. Some commenters have noted that ESA section 10 procedures are already used by developers and that requiring additional procedures in the CGP to protect species amounts to "double regulation."

EPA intends to provide applicants with the greatest degree of flexibility in meeting the Part I.B.3.e.(2) eligibility requirements for CGP coverage. The permit allows applicants to use section 10 procedures to meet the eligibility requirements of Part I.B.3.e.(2). As such, EPA is not imposing "double regulations" on permittees.

Other commenters have also questioned whether there is a need to have these procedures where a 404 permit is being issued or where a NEPA review is being conducted for the same site. EPA notes that a 404 permit or a NEPA review can suffice for CGP coverage under part I.B.3.(e)(2)(b), provided, a section 7 consultation has been performed as part of the NEPA review or 404 permit issuance and the consultation addresses effects from storm water discharges and storm water discharge-related activities.

One commenter noted that some States have protective and stringent environmental review laws which apply to NPDES permits and there is no reason for applicants in those States to undertake additional requirements to protect listed species and critical habitat. EPA notes that while the information developed for compliance with State environmental review statutes can be used to meet the eligibility requirements of Part I.B.3.e.(2)(a) for CGP coverage where there are no listed species present or where there is no likelihood of adverse effects to listed species, EPA does not believe that compliance with a State environmental review by itself is sufficient to substitute for section 7 consultation or a section 10 permit since State reviews may not take Federally listed species and critical habitat into account. However, information generated from a State environmental review can also serve as a basis for a section 7 consultation or applying for a section 10 permit for the purposes of meeting the eligibility requirements of Part I.B.3.e.(2)(b) or (c).

(K) Some commenters have asked for clarification on whether EPA is requiring permit applicants to address State and Federally listed endangered and threatened species or solely Federally listed species. One commenter recommended that applicants should be made aware that State laws and regulations involving endangered species may impact their projects. EPA is requiring that permit applicants

consider impacts to Federally listed species and designated critical habitat. However, EPA notes that States have the authority to impose their own requirements under State law to protect Federally or State protected species from construction activities, and that Part VI.M. of the CGP states that coverage by the permit does not release any permittee from meeting the responsibilities or requirements imposed under other environmental statutes or regulations. Those environmental statutes and regulations include State laws for the protection of imperiled wildlife and vegetation, and other natural resources.

(L) One commenter has characterized the CGP conditions as allowing any discharge unless it is likely to adversely affect a listed species of critical habitat. It expressed the belief that this is not the correct standard to use when determining coverage under a general permit which is meant for routine cases.

EPA notes, however, this standard will ensure that the operation of the permit is not likely to adversely affect listed species and critical habitat. This approach, which was subject to ESA section 7 consultation with the Services, will focus limited EPA and Service resources on those permitting situations where potential adverse effects are likely. This is important given the vast number of activities projected to be covered by the CGP. Thus, EPA believes this standard to be appropriate for the CGP.

(M) Some commenters have expressed the belief that hydrologically, geologically, or environmentally unique areas such as the Barton Springs watershed near Austin, Texas, require special protections for listed species and critical habitat. They have requested that either separate, more stringent general permits be developed for these areas or that EPA require individual permits for construction activities occurring there. One commenter has also requested that a separate consultation be conducted for the Barton Springs segment of the Edwards Aquifer.

EPA believes that the final CGP conditions provide stringent protection for the environment and listed species. EPA closely coordinated with the Services on which ESA section 7 approach was best suited for EPA's issuance of the CGP. EPA and the Services agreed that a national ESA section 7 consultation coupled with permit conditions to allow for individual site-specific consultations is the best mechanism to assure that the CGP is protective of listed species and the environment.

The Agency believes that the general permit as issued insures that any area with special site-specific circumstances will be protected. No discharge may be authorized under this permit that will adversely affect any listed species, unless those effects have been actually addressed through an ESA section 7 consultation process or section 10 permit issuance that takes into account the impact on the particular species of concern. Therefore, EPA believes that the process envisioned by this general permit effectively provides for consideration of site-specific issues that are of concern to this commenter.

(N) One commenter has questioned whether EPA complied with the ESA section 7 conferencing requirements to confer with the Services where an agency action is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. In response, the CGP does not authorize any storm water discharges or storm water discharge-related activities that are likely to jeopardize the continued existence of any proposed species or result in the adverse modification or destruction of proposed critical habitat. Nonetheless, EPA entered into and completed ESA section 7 conferencing with the Services at the same time it undertook informal consultation.

(O) Several commenters have asked for clarification on the extent of their liability if they rely on another operator's certification with respect to effects to listed species and critical habitat if that certification proves to be inadequate or contains falsehoods. Also, utility operators have raised the issue as to the nature and extent of their liability where their certification is based on another operator's certification.

Applicants/permittees who rely on another operator's certification to meet the eligibility requirements of the permit may be liable for inadequacies or falsehoods in that certification. This potential liability is well described in the certification language of the NOI form which states:

> I [the applicant] certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage this system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Thus, it is important for those applicants who choose to rely on another operator's certification that they carefully review that certification and its SWPPP for accuracy and completeness. If the certification appears to be inadequate in any way, then EPA recommends that an applicant provide an independent basis for its certification in its SWPPP. EPA notes that as a matter of enforcement discretion it will consider the circumstances that are unique to each enforcement situation, and an applicant's good faith reliance on another operator's certification may be a mitigating factor in such situations. Utilities that fit the definition of operator and who choose to rely on another operator's certification are liable to the same extent as any other operator who relies on another operator's certification.

(P) One commenter asserted that the proposed permit is not in compliance with section 7(a)(1) of the ESA, which directs agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purposes of the ESA include recovering listed species so that they no longer need ESA protection, and conserving the ecosystems upon which listed species depend.

EPA believes that the protections built into this permit will not only avoid or minimize adverse effects to listed species, but also affirmatively benefit such species, the ecosystems upon which they currently depend, and the unoccupied habitat into which they may recover. These benefits are inherent in the fact that the function of this permit is to reduce discharges of pollutants into the aquatic environment. Reducing pollution from construction activities reduces stress on both the individuals of listed species and aquatic ecosystems. Moreover, the permit contemplates that case-by-case protection may be developed, as appropriate, when consultation with the Service(s) occurs prior to permit coverage. The involvement of the Service(s)' biologists in such cases ensures that site-specific conservation opportunities will be identified.

(Q) Some commenters have requested that residential construction that occurs on a fully developed site be exempt from the endangered species certification requirement.

EPA declines to provide that exemption. EPA notes that impacts to listed species and critical habitat can also occur from development and construction even on fully developed sites (for example, at the point of

discharge into surface waters) and thus, residential construction operators should not be exempted from the endangered species certification requirements.

(R) Some commenters are concerned that Fish and Wildlife Offices (FWS) may not have enough staff to respond to queries or consultation requests from CGP applicants regarding listed species and critical habitat.

EPA believes that the Services have the staffing levels to address queries from permit applicants and notes that the CGP was issued in close consultation with FWS. The CGP also provides flexiblity by allowing permit applicants to use sources other than FWS for obtaining information on listed species. Applicants can use the Natural Heritage Centers whose addresses are listed in listed in Addendum A of this permit. Therefore, EPA believes that the flexibilities built into the CGP will ensure that the FWS offices are not overburdened.

(S) One commenter expressed concern regarding the obligation of NPDES storm water permitted facilities in determining construction site compliance with the ESA and NHPA. The commenter requested a clarification that the role of an NPDES-permitted municipality is limited to verifying that the pertinent sections of the NOI have been completed and that municipality is not under an obligation of verify the accuracy of certifications under the ESA and NHPA.

The reference to "NPDES permitted municipality" was intended to refer to a Municipal Separate Storm Sewer System (MS4) with an NPDES permit. The CGP does not impose requirements on MS4s to evaluate or verify NOIs submitted by third parties. However, if a municipality were to receive CGP coverage as an operator (by itself engaging in construction activities or development) as defined in Part IX.N. of the CGP, its obligation to meet the eligibility requirements of Part I.B.3 would be the same as any other operator under the CGP.

(T) Some commenters have stated that the proper party to bear responsibility for impacts to listed species is the public owner or site developer.

It is not clear whether this commenter intends for the term "public owner" to refer to governmental entities. EPA notes that the CGP applies to anyone who fits the definition of "operator" in Part IX.N of the permit. The CGP does allow for an overall developer or public owner to provide for a comprehensive certification which can be adopted by other operators on the site. While allowing for a single comprehensive certification to cover for other operator certifications may be the most efficient way to meet the certification requirements in many cases, there will also be situations where it is better to allow site operators the option of providing an independent basis for their certifications. Some operators may be in a better position to accurately assess the effects of their actions on listed species and may not want to rely on another operator's certification. There could also be instances where a primary contractor, and not the developer or owner, is better situated to develop a comprehensive certification. For those reasons, EPA declines to impose certification requirements solely on the public owner or site developer.

(U) Some commenters have stated that complying with the ESA certification procedures will require a substantial increase in time and resources in many situations and may double the paperwork burden from that of the earlier, first round Baseline Construction General Permit (BCGP).

EPA acknowledges that the CGP will impose an increased burden on operators to meet the certification requirements as compared to that of the BCGP. However, the substantive requirements for the CGP are more flexible and allow for NPDES coverage in more situations than the BCGP which denied coverage to anyone whose discharges might adversely affect listed or proposed to be listed endangered and threatened species or critical habitat (57 FR 41218, September 9, 1992). EPA also notes that CGP eligibility requirements represent a substantial improvement over the baseline protections which were rudimentary with respect to protecting listed species.

EPA has worked closely with the Services and given great consideration of public comments to ensure that these procedures are as flexible and least burdensome as possible. By allowing operators to rely on another operator's certification, EPA believes any additional burden imposed by these requirements can be kept to a minimum. EPA also notes that many of the procedures established to meet the CGP eligibility requirements are the same as those that developers or contractors would have to undergo anyway in order to obtain a section 10 permit for protection from ESA section 9 liability for incidental takes. The permit does allow for the acquisition of a section 10 permit as a way to meet the eligibility conditions. EPA has also provided guidance, containing species lists and other information, to assist permittees in meeting the eligibility requirements. Therefore, EPA believes that an increase in burden will be minimized for most applicants and can be balanced against the greater availability of CGP coverage to applicants.

(V) Some commenters have stated that the ESA certification requirements violate the Paperwork Reduction Act (PRA). EPA has modified its Information Collection Request (ICR) to account for changes in the paperwork burden imposed by the certification requirements and has followed all other procedures to ensure that the PRA requirements are met. Therefore, EPA has issued the CGP in full compliance with the PRA. EPA will be analyzing future NOIs to adjust certification burden estimates appropriately in the renewal of this revised ICR.

Protection of Historic Properties

EPA received numerous comments concerning implementation of National Historic Preservation Act (NHPA) requirements in the CGP. To avoid any confusion or inconsistencies that may result after further discussions between EPA and the Advisory Council on Historic Preservation under the NHPA, this permit does not include eligibility restrictions or evaluation requirements related to historic preservation. EPA may modify the permit at a later date based on those discussions. In that modification action, EPA would respond to NHPA-related comments submitted when EPA proposed today's permit to the extent such comments remain relevant.

Notice of Intent and Notice of Termination Requirements

Notice of Intent (NOI)

Several of the comments received regarding proposed revisions to the Notice of Intent (NOI) form requested clarification and questioned the need for some of the information being requested. It is important to note that the revised NOI form is still undergoing development and may not be issued in its final form by the time the final CGP is published. Until the revised NOI form is finalized and published in the **Federal Register**, applicants must use the existing NOI form which does not contain the specific certification provisions relating to listed species, critical habitat or historic properties at construction projects. However, use of the existing NOI form does not relieve applicants of their obligation to follow the procedures listed below to determine if their construction storm water discharges or storm water discharge-related activities meet permit eligibility requirements for the protection of historic properties.

One commenter opposed the requirement for a separate NOI from the "owner/developer" and the "operator" stating that the terminology is not consistent with Part III.E, Responsibilities of Operators, of the proposed permit and that a single NOI from the owner or operator is sufficient. In response to this comment, when applying the two criteria found in the definition of "operator" (i.e., the party that has control over construction plans and specifications, and the party with control over implementing SWPPP or other permit conditions), two or more entities may be required to submit NOI forms for permit coverage. At a typical construction project, the owner will usually meet the first criterion while the site's general contractor will meet the second, thus requiring that both entities submit a NOI. Where the owner is also the project's general contractor, only one NOI form may need to be submitted. Since EPA believes the terminology used in Parts III.E.1 and III.E.2 of the proposed permit to be consistent with the definition of "operator," no changes were made in the final permit.

Two commenters favored the use of county information on the NOI form. Another recommended that the submission of latitude and longitude data for a site be optional since other legal descriptions are more readily available. In response, EPA has found that latitude and longitude are universally used to describe location on maps and are compatible with Geographic Information Systems (GIS). The use of latitude and longitude will also allow EPA to interface with State GIS systems, thus enhancing EPA's ability to deal with projects on a watershed basis. The NOI form instructions provide an Internet address which provides latitude and longitude information as well as a toll free phone number to obtain U.S. Geological Survey quadrangle maps. Consequently, requests for county and latitude/longitude information will remain on the NOI form.

Two commenters were concerned with the question regarding compliance of the Storm Water Pollution Prevention Plan (SWPPP) with applicable local sediment and erosion plans. One stated that a certification cannot be given by the general contractor who did not design the post-construction controls or the owner who has delegated the authority for the construction controls to the general contractor. The commenter suggested rewording Part II.B.1.h of the proposed permit. Upon further consideration, EPA found this question to be unnecessary and has deleted it from the NOI form.

One commenter recommended changing the term pollution prevention plan to storm water pollution prevention plan. EPA made this change to the NOI form.

One commenter believes it is sufficient that the SWPPP be completed prior to commencing construction activity and not before the NOI form is submitted. EPA has deleted the question regarding implementation of the SWPPP. However, before the NOI form can be submitted, the SWPPP must be completed to ensure that appropriate controls to meet ESA and NHPA certification requirements, if needed, are included to avoid or mitigate adverse effects to listed endangered or threatened species, critical habitat or historic properties. Since applicants do not have to submit their NOI's until 48 hours prior to the commencement of construction, this is not a significant period of time and should have no effect on construction activities.

One commenter recommended deleting the question regarding estimate of the likelihood of discharges or clarifying its purpose. In response, EPA believes that it is important to request such information because it requires applicants to consider the expected frequency of discharges from a site and anticipate the need for inspections and maintenance of storm water controls. In response to another comment that requested this question be deleted because the environmental risk between infrequent arid discharges and more common temperate discharges has not been established, EPA will not use responses to this question as an absolute measure of risk but only an indication of risk at that site.

One commenter requested that EPA expand the requirements of the NOI to provide better accountability to the public and government agencies and improved oversight of a project. The commenter noted that the Urban Wet Weather Flows Federal Advisory Committee (UWWFFAC) agreed upon an "expanded NOI" for industrial activities and agreed on this idea for construction activities as well. However, consensus on what the "expanded NOI" should consist of for construction activities was not reached. In addition, the commenter suggested the following items (which should be included in the SWPPP and known at the time of submittal of the NOI) be added to the form: a brief description of the project; the overall size of the project in addition to the number of acres that will be disturbed; if there are any permanent water bodies including wetlands on or near the site; how close the disturbed areas will be to the water body or wetland; predominant soil type (soil conservation service soil series, hydrological soil group and erosion factors); maximum slope in disturbed areas; a check-off section for identification of principal Best Management Practices to be used on-site; number of phases for the project (if 10 acres or above); number of acres per phase (if 10 acres or above) or for the whole project (for projects less than 10 acres; the schedule of construction activities; and for each phase the estimated time and number of acres that will be exposed to precipitation after removal of vegetative cover and before final stabilization. In response, since these additional questions were not proposed for public comment, will increase the regulated community's administrative and cost burdens associated with completing the form, and are subject to prior U.S. Office of Management and Budget review and approval, EPA is not including them on the NOI form at this time. EPA is, however, proceeding with an expanded revision to the NOI form for industrial storm water dischargers applying for coverage under EPA's Multi-Sector General Permit.

One commenter suggested that it would be more efficient to administer NOIs at the EPA Regional level and asked if this data can be accessed or used by the public or permit holders. EPA has found that having a central location for processing NOIs has been an efficient and effective method of managing the tremendous amount of data which the program has generated since its inception in 1992, and sees no reason to change at this time. Members of the public can request information contained in the NOI database by sending a signed letter to the US EPA (4203), Storm Water NOI Center, 401 M. Street, SW, Washington, D.C. 20460.

To streamline and clarify the NOI, EPA intends to make other changes to the proposed form. These changes are contingent upon EPA receiving approval from the US Office of Management and Budget. The terms located underneath the EPA logo on the form have been revised to state that: (1) Submission of the NOI constitutes notice that the eligibility requirements in Part I.B. of the general permit, including those related to protection of endangered species and critical habitat, are met; (2) the applicant understands that continued authorization to discharge is contingent on maintaining permit eligibility; and (3) implementation of the SWPPP will begin at the time the permittee begins work on the construction project. These clarifications were made to emphasize

the need to meet requirements pertaining to endangered or threatened species and critical habitat.

EPA has made information regarding the location for viewing site SWPPPs and contact information optional. EPA encourages applicants to provide this information to improve public access to view SWPPPs. Upon request, EPA intends to assist members of the public in obtaining access to permitting information, including SWPPPs.

For clarification, EPA has reworded the question regarding listed endangered or threatened species or designated critical habitat in the project area of this site. EPA has changed the proposed certification statement to be the same as that contained in Box 1 of the current NOI form. The proposed certification statement had included information regarding the Endangered Species Act and National Historic Preservation Act. This information has been moved to a different section of the form to appear as two separate questions where applicants can check under which provision of the permit they satisfy eligibility requirements with regard to protection of endangered or threatened species or their critical habitat. Applicants will not be required at this time to identify which provision of the permit they are certifying eligibility under for the protection of historic properties. The Agency intends on modifying the permit (if necessary) after completion of the Programmatic Agreement between EPA and the Advisory Council on Historic Preservation in order to provide the certification language.

EPA deleted the following questions because they were determined to be unnecessary: (1) "Will construction (land disturbing activities) be conducted for storm water controls?"; and (2) "Is application subject to a written historic preservation agreement?"

EPA requested comments on alternative time frames for NOI submittals. One option required a 30-day advance time frame in which to submit a NOI. The Agency received several comments encouraging EPA to adopt the 30-day time frame because it would provide the developer with a permit number at the commencement of construction. All other operators could then apply for coverage 48 hours before beginning work at the project. This would provide a consistent tracking mechanism for each project since the project name and contractors may change during the course of a project. It would also allow EPA sufficient time to verify that permittees are eligible for coverage under the ESA provisions. Another commenter suggested that the 30-day period would allow citizens more time to find out about a project, assess the storm water management plans, and discuss their concerns with the permittee if necessary. In this way, prior notice could actually reduce disputes and controversy. Under the 48 hour requirement contained in the BCGP, an NOI would probably not be received by EPA until construction had already started.

However, most commenters stated that the present requirement of filing a NOI 48 hours prior to the commencement of construction activities should remain in effect. They felt extending the deadline to 30 days would hinder construction efforts, bring about unnecessary delays, disrupt construction schedules, and place unnecessary additional burdens on permittees. One commenter from Alaska stated the Alaska construction season is short and in some cases a 30-day advance filing period would delay a project for an entire year. Another commenter stated any extension of the two day notification time frame would only serve to slow residential construction activities and add interests costs to the activities of small businesses and home buyers. The commenter also felt that requiring the 30-day advance notice on small, routine construction projects would force project teams and construction crews to be mobilized for at least one additional month, without much environmental benefit and at additional expense.

After considering all comments related to the 30-day NOI submission requirement, EPA has retained the permit requirement to submit an NOI at least 48 hours prior to the start of construction activities.

Many commenters expressed concern about having to submit up to three NOI forms for ongoing construction projects in order to maintain permit coverage. For instance, an initial NOI was required 48 hours prior to the commencement of construction activities under the BCGP. Then, a second NOI was required at least 48 hours prior to the permit's expiration date to continue coverage for ongoing projects. Finally, a third NOI must be submitted for the project if it was not completed prior to the effective date of the reissued general permit.

A number of applicants stated the process should be simplified. They noted that EPA should issue a blanket extension to cover all projects which continue after the expiration of the BCGP, and permittees should be allowed to submit an abbreviated form to receive continued permit coverage. One commenter suggested that permittees send in post cards requesting extended coverage under the expired permit, and file a new NOI when the permit is reissued. The post card would be a pre-printed form by EPA where the permittee fills in the blanks.

In response to the comments concerning the need to submit multiple NOIs in order to maintain permit coverage, EPA has simplified the process for dischargers covered by the permit prior to expiration. If EPA does not reissue this permit prior to expiration, EPA will presume that covered permittees seek continuing coverage unless and until EPA receives a Notice of Termination (NOT) (see Part VI.B. Continuation of the Expired General Permit). Commenters expressed serious concern about having to submit multiple NOIs based on the lapse between expiration of the previous permit and issuance of this permit. In order to maintain continuing authorization under the expired permit, permittees were required to reapply prior to expiration. Then, upon issuance of this permit, an additional "new" NOI for authorization under this permit is required. To avoid this double NOI submission near the time of permit expiration and reissuance, EPA would have needed to modify the earlier CGP prior to expiration to remove the requirement for resubmission of an NOI prior to expiration. As a result, EPA is making those changes in today's permit. For more information, see the section below titled "Continued Coverage Under the Permit if it Expires Prior to Reissuance or Replacement."

One utility group estimated that in Texas alone a total of 24,400 "requests for service" were received in 1996 where the requestor of service was impacting five (5) or more acres of land. If the proposed general permit were in effect, the utility group would have to submit 48,000 NOIs/NOTs to EPA at an additional annual cost as high as $75 to $100 million in order to comply with this general permit. The utility group stated that EPA's proposal encourages, if not requires, a fragmented approach to control over storm water pollution prevention activities. In response, EPA has re-evaluated the status of utility company service line installations and has found that these activities generally do not meet the definition of operator, thus do not require permit coverage. The final permit has been revised to eliminate the need for utility companies to submit NOIs for permit area-wide coverage.

One commenter stated there is a provision in the regulations that allows for a general permit to be issued without the submittal of a NOI. The commenter

urged EPA to consider the adoption of a general permit program that eliminates the need to submit a NOI, particularly in areas where State or local governments already have sediment and erosion control or storm water management requirements in place. In response to this suggestion, 40 CFR 122.28(b)(2)(v) excludes this option for entities seeking coverage under the general permits for discharges of storm water associated with industrial activity (which includes construction activity). Consequently, the requirement that operators seeking permit coverage submit a NOI will remain in the permit.

NOT (Notice of Termination)

The Agency received comments supporting the idea that permittees must submit a Notice of Termination (NOT) within 30 days after completion of their construction activities and final stabilization of their portion of the site. The commenters stated that it would improve permittees accountability. No change has been made to the permit.

Several commenters recommended that special provisions should be added to the Notice of Termination for projects which occur on agricultural lands. For projects such as an underground pipeline crossing agricultural land, the commenters argued that the conditions for meeting "final stabilization" should be modified. EPA agrees that in such a case where agriculture is final land use, the provisions of the NOT pertaining to final stabilization may not be appropriate. The definition of final stabilization in the final permit has been modified to include a provision which includes land that has been returned to its previous agricultural use.

The NOT requirements of the final permit have been modified to be consistent with the existing NOT form. However, the conditions under which the NOT can be submitted have been clarified to address concerns raised by commenters. The current NOT form expires on August 31, 1998. EPA is in the process of renewing the form before that date. For more information, refer to the responses to comments on residential construction, final stabilization, and the definition of operator.

Storm Water Pollution Prevention Plan Requirements

Deadlines for Compliance With the New SWPPP Requirements

Several commenters requested additional time to come into compliance with the new requirements of the SWPPP. EPA agrees that additional time may be necessary to review the requirements of the new permit and achieve compliance with these requirements. Accordingly, Part II.A.5 of the final permit was modified to provide 90 days to come into compliance with the new SWPPP requirements (rather than 30 days as proposed in the draft permit) for permittees with ongoing projects which are currently operating under the previous Baseline Construction General Permit (BCGP).

The final permit also provides (Part II.A.6) for permittees submitting NOIs for new projects during the 90 day period following the effective date of the permit. These permittees will also be provided 90 days after the effective date of the new permit to achieve compliance with the new SWPPP requirements provided that they have developed and are ready to implement a SWPPP based on the BCGP requirements at the time of NOI submittal. This provision rewards conscientious operators who made the effort to control their discharges and comply with the BCGP provisions even though the final version of the CGP was not legally available at the time they began construction. Requiring compliance with an "interim" SWPPP based on the BCGP for the first 90 days ensures a level of environmental protection during the time that the permittee is updating their plan to comply with the final CGP conditions.

Compliance with such an interim SWPPP represents limitations based on BAT because, as EPA explained when it issued the previous BCGP, in developing technology-based standards applicable to storm water permits for construction activity the time required to develop and implement a SWPPP is a necessary consideration in determining whether a requirement is economically and/or technologically achievable. Development and implementation of SWPPPs require time. To develop the SWPPP required by the CGP, EPA believes 90 days from the effective date of the permit represents a reasonable estimate of what is economically and technologically achievable. To implement such a SWPPP, EPA believes that 90 days from the effective date of the permit is economically and technologically achievable. In the interim period until development and implementation of the SWPPP required by today's permit, EPA believes that compliance with an interim SWPPP is economically and technologically achievable.

Operators who do not have an interim SWPPP at least as stringent as would have been required under the BCGP must prepare their SWPPP based on the final CGP prior to submitting an NOI. Given the short term of some construction projects, this procedure ensures that the Agency does not provide a loophole under which a permittee could receive authorization to discharge for 90 days without having to implement any storm water controls whatsoever.

Retention Ponds

Several comments were received regarding the section of the permit describing the use of Structural Practices (Part IV.D.2.a.(3)). The proposed permit describes the structural practice required for common drainage locations that serve an area with 10 or more acres disturbed at one time: * * * "a temporary (or permanent) sediment basin providing 3,600 cubic feet of storage per acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site." One commenter referred to this section of the proposal as a "new" requirement. The requirement has in fact been in place since the 1992 general permit. Several commenters suggested that the permit allow that the volume requirements be adjusted in consideration of differences in meteorologic conditions and the runoff coefficient. The proposed retention requirements were based on containment of a 2-year, 24 hour storm which was assumed to be three inches, and also the assumption that the runoff coefficient would be 0.33. After consideration of these comments, EPA has modified the language in this section to read "A temporary (or permanent) sediment basin that provides storage for the volume of runoff calculated using the local 2-year, 24 hour storm and runoff coefficient from each disturbed acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site. Where no such calculation has been performed, a temporary (or permanent) sediment basin providing 3,600 cubic feet of storage per acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site." Comments were also received on the inappropriateness of such a requirement for linear construction projects. In response, the requirement only applies to sites where 10 acres of disturbance share a common drainage location. This scenario is unlikely on a linear construction site, where runoff is typically served by several drainage locations. However, if it does occur, the permit requirements would apply.

Sod Stabilization

A few commenters noted that sod stabilization was listed as an erosion control method, but was not listed as a final stabilization method. In section III.A.1.d of the draft fact sheet, EPA lists sod stabilization as a stabilization practice for sediment and erosion control. Sod stabilization is again listed in Part IV.D.2.a.(2) of the draft permit, with other stabilization practices in the sentence: "Stabilization practices may include: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation, and other appropriate measures." The permit also notes that this list is intended to include interim and permanent stabilization measures. As such, EPA believes that sod stabilization was adequately indicated as a final stabilization option in the proposed permit.

Off-Site Vehicle Tracking of Sediments

Part IV.D.2.(c) of the draft permit required that off-site vehicle tracking of sediments be minimized. A commenter noted that the draft fact sheet had suggested that wash racks be provided to reduce off-site tracking of sediments from construction sites. The commenter was unclear whether or not this was considered a requirement of the permit. The commenter contended that wash racks may increase pollutant discharges in some circumstances and that wash racks should be optional. Other commenters noted that the time of arrival of delivery trucks varies, and concern was expressed that costs could be increased if the permit were to require power washing of trucks at all times of the day. Also, since there may be insufficient space for placement of stabilized construction entrances in some cases, it was suggested that shoveling of dirt from the street should be an acceptable alternative.

The draft fact sheet noted that there are a number of BMPs which may be implemented to comply with Part IV.D.2.c.(2) including gravel exits, wash racks or stations, and street sweeping. EPA's guidance manual entitled "Storm Water Management for Construction Activities, Developing Pollution Prevention Plans and Best Management Practices," EPA 832-R-92-005, also mentions the scheduling of deliveries at a time when personnel are available for cleanup (if needed) as another BMP to be considered.

However, the draft permit did not specify the precise BMPs to be implemented to comply with Part IV.D.2.c.(2), nor did the permit necessarily require all possible BMPs in every circumstance. Wash racks, for example, would be one of several control measures to be considered by permittees, but not necessarily required. EPA believes that the draft permit language provides the necessary flexibility to allow operators to select the most appropriate BMPs depending on individual conditions. As such, the proposed Part IV.D.2.c.(2) in the draft permit was retained in the final permit.

Another commenter approved of the requirement to remove off-site sediments, but also recommended that the permit should require removal within a specified time frame such as within 30 days. In addition, this commenter recommended that the permit should require sediment removal from streams, wetlands and other waters of the United States rather than just off-site areas.

With regard to the issue of the time frame for removal of off-site sediments, the draft permit had required that removal be conducted at a frequency necessary to minimize impacts. The final permit retains this requirement in consideration of the variety of construction projects which would be covered by the permit and the need for adequate flexibility.

With regard to the issue of sediment removal from streams and wetlands, we would point out that the purpose of the NPDES permit program is to control discharges of pollutants before they enter waters of the United States. The permit regulates discharges resulting from activities of permittees prior to outfalls discharging to waters of the United States to the extent necessary to ensure compliance with water quality standards in the receiving waters (including any requirements pertaining to sediment accumulations) and technology-based effluent limitations. As such, the final permit does not include the commenter's recommendation to include requirements for sediment removal in the receiving waters. Removal of sediments from the receiving waters would be addressed outside the realm of NPDES permit requirements such as through enforcement action against a permittee for noncompliance with the permit.

Avoiding Impervious Surfaces for Stabilization

A commenter objected to the statement in Part IV.D.2.a.(2) of the draft permit which reads: "Use of impervious surfaces for stabilization should be avoided." The commenter appears to be interpreting the statement as a prohibition or near prohibition of the use of impervious surfaces for stabilization. The following was suggested as an alternative: "Pervious surfaces for stabilization are preferable to impervious surfaces when the application is appropriate for the use."

The statement discouraging the use of impervious surfaces is included in the draft permit in consideration of the fact that impervious surfaces will increase runoff and may increase erosion and pollutant discharges. However, the statement does not prohibit the use of impervious surfaces for stabilization and EPA believes that the existing language does not need further clarification in this regard. As such, EPA has retained the proposed language in the final permit.

Flexibility in Choosing Controls

Some comments were received requesting more flexible permit conditions. In particular, one commenter stated that the permit requirements for erosion controls (*e.g.* sediment basins) and performance standards may not be appropriate to all sites throughout the nation. EPA's permit requirements for erosion control are intended to be flexible enough to allow the permittee to design site specific controls which are appropriate given the site topography, climate, and geographic location. The parts of a storm water pollution prevention plan (SWPPP) that require stabilization practices, structural practices, and storm water management all include the statement: "Such practices may include * * *" These parts of the SWPPP list some potential controls that should be considered by the permittee when designing a comprehensive plan to minimize erosion and sedimentation. The permit language for sediment basins serving common drainage locations with 10 or more acres of disturbed area, also includes the words "or equivalent control measures, shall be provided * * *" This language allows the permittee the flexibility to design and install appropriate site specific controls.

With regard to use of flexibility when choosing appropriate storm water controls for a construction project, comments were received concerning factors to consider such as public safety and proximity to airports. Commenters stated that storm water controls should be designed to reduce safety risks, especially to children. Also, structures which maintain a continuous habitat for wildlife, such as storm water retention ponds, should not be constructed within 10,000 feet of a public-use airport serving turbine powered aircraft or within 5,000 feet of a public-use airport serving piston powered aircraft due to

the potential hazards to aviation caused by birds. EPA agrees with both comments and has included language in the Part IV.B of the Fact Sheet to address them.

Implementation Schedules

Other commenters raised issue with Part IV.D.2.a.(2) of the proposed permit, which requires a record in the storm water pollution prevention plan (SWPPP) of the dates for implementation of stabilization practices for erosion control. Several commenters interpreted this as a requirement to predict in advance the specific dates when the stabilization practices would be implemented. The commenters argued that since the pace of a construction project cannot be known with certainty, it would not be possible to make such predictions. Concern was also expressed regarding Part IV.D.2 of the draft permit which requires that the SWPPP include the "timing" for the control measures which would accompany the construction project. Although the general timing may be reasonably predictable, the precise timing can not predicted.

With regard to Part IV.D.2.a.(2) of the draft permit, it is not EPA's intent that the dates for the implementation of the stabilization practices be included in the SWPPP which is prepared at the time a construction project begins. Rather, permittees would maintain and update a record of such dates when the dates for implementation are known. The record would be attached to the SWPPP. The final permit has been modified to clarify this matter.

The intent of Part IV.D.2 of the draft permit is to ensure an appropriate sequence of construction activities and accompanying BMPs to minimize erosion. It is not EPA's intent that the exact timing of the control measures be predicted in advance. For clarity, the final permit replaces the word "timing" with "general timing" as was suggested in the comments. The permit also provides an example of the type of sequencing of construction activities and BMPs which is intended by this permit requirement.

Local Requirements

Part IV D.2.c.(3) of the proposed permit includes the requirement to ensure and demonstrate compliance with applicable state, tribal and/or local waste disposal, sanitary sewer or septic system regulations to the extent that applicable requirements exist within the permitted area. One commenter requested that this language be deleted. The comment stated that these regulations apply regardless of the storm water permit. EPA agrees with this. however, EPA also believes that an explicit statement of one's responsibility to comply with state, tribal, and local regulations eliminates any doubt as to their applicability to a project. It is not EPA's intent to require permittees to reproduce pre-existing state, tribal, or local plans for the sole purpose of including them as part of the project SWPPP. Plans affecting the permitted activity, construction, may be referenced in the SWPPP. The location of the other plans/policies, etc., should also be clearly stated in the SWPPP. The provision for demonstration of compliance with state, tribal and/or local regulations remains in the permit.

Another commenter raised concerns over what they saw as overlapping and conflicting requirements between the proposed permit and existing State, Tribal, and local requirements in general. In response, EPA draws their attention to Part IV.D.2.d. of the proposed permit, which states that the permittee shall provide certification in their storm water pollution prevention plans that reflect appropriate State, Tribal and local regulations. Nothing in the permit is intended to relieve the permittee of his obligations to comply with appropriate State, Tribal, or local requirements. In a situation where there are similar requirements under different programs, a permittee should comply with the more stringent of the requirements. Permittees may also use existing plans or local approvals as part of their pollution prevention plans when such use is appropriate.

Signature, Plan Review and Making Plans Available

Several comments objected to the requirement that permittees provide public access to SWPPPs. Some questioned whether EPA has the authority to require permittees to provide such access. Others raised liability issues with regard to allowing the general public to enter construction sites. The proposed requirement was intended to provide the public with information concerning the project and the SWPPP. EPA does not intend to allow the public uncontrolled and unlimited access to construction sites or to cause hazards or disruptions at constructions sites. In response to the comments, Part II.C.2 has been deleted (62 FR 29809) and Part IV.B.2 has been rewritten. The changed language requires site operators to conspicuously post a notice near the main entrance of the site. For linear construction projects (*e.g.*, pipelines or highways) the notice must be placed in a publicly accessible location near where construction is actively underway and moved as necessary. If it is infeasible for the operator to post the notice at the main entrance of the site, the notice shall be posted in a local public building such as the town hall or the public library. The notice shall include the following information: the project's NPDES permit number; the local contact name and phone number; a description of the project; and location of the SWPPP if it isn't maintained on site. The permit does not require that the general public have access to the site, nor does it require that operators provide copies of the plan, or to mail copies of the plan, to members of the public. EPA strongly encourages permittees to provide the public with access to SWPPPs during reasonable hours. Upon request, EPA intends to assist members of the public in obtaining access to permitting information, including SWPPPs. EPA believes that this approach will create a balance between the public's need for involvement in projects potentially impacting water bodies and the operator's need for safe and unimpeded work conditions.

Site Inspections

The June 2, 1997 proposed permit required site inspections to be conducted once every fourteen calendar days. Several comments expressed positive feedback that the proposed permit decreased the frequency for inspections from once per seven calendar days, the requirement of the baseline general permit promulgated in 1992, to the fourteen day period now required. However, the feeling was that this was still too burdensome. The purpose of an inspection at construction sites/projects is to ensure that the pollution control measures described in a project's pollution prevention plan are operating in the manner which is described in the plan. The high level of activity which typically occurs at construction sites can increase the potential for control measures to be displaced or disrupted. Given the unpredictability of the weather, EPA believes that inspections at the proposed frequency will provide assurance that when a storm event occurs, control measures will be operating properly. An inspection frequency less than that which was proposed is not adequate to verify proper and continued operation of control measures. Therefore, the inspection frequency remains as proposed.

Another commenter raised issue with the frequency of inspections, in that too many would cause damage to restored areas of linear projects, such as pipeline

construction. They stated that alternative inspection schedules would be more appropriate for these types of projects. In reply, EPA reiterates that the purpose of inspections is to make sure that the storm water pollution prevention controls and measures are operating properly. When construction activities are occurring along various locations of the project, such as a pipeline, inspections should be conducted to ensure that control measures in that area are operating properly. EPA would also point out that Part IV.D.4 of the permit provides that inspections are only required once every 30 days for areas which are finally or temporarily stabilized. EPA concludes therefore, that no alternative inspection schedule should be included in the final permit for such projects.

One commenter expressed concern regarding inspections at airports and how they could be accomplished in compliance with FAA regulations, particularly with regard to aspects of safety and security. In response, EPA notes that the inspection provisions of the permit pertain to the operator of a construction project inspecting his storm water management systems and control measures. All EPA inspectors will produce official credentials upon request to satisfy security concerns, and will be able to accommodate reasonable safety procedures consistent with the purpose of verifying permit compliance. EPA does not believe that additional requirements need to be added to the permit.

Several comments were received on the difficulty in predicting storm events and the requirement for qualified personnel to inspect areas specified on the site "* * * before anticipated storm events (or series of storm events such as intermittent showers over a period of days) expected to cause a significant amount of runoff * * *" Part IV.D.4. After consideration of these comments, EPA has modified this section to read "Qualified personnel (provided by the permittee or cooperatively by multiple permittees) shall inspect disturbed areas of the construction site that have not been finally stabilized, areas used for storage of materials that are exposed to precipitation, structural control measures, and locations where vehicles enter or exit the site at least once every 14 calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater." The Agency will, however, retain the language in Part IV.D.3, which reads "* * * maintenance shall be performed before the next anticipated storm event, or as necessary to maintain the continues effectiveness of storm water controls." EPA also recommends that permittees perform a "walk through" inspection of the construction site before anticipated storm events (or series of storm events such as intermittent showers over a period of days) expected to cause a significant amount of runoff . The Agency believes this modification will relieve regulatory burden, while continuing to place sufficient emphasis on the importance pre-storm preparedness.

Another commenter supported the proposed requirement for inspections prior to anticipated storms. However, as noted above, this provision was removed from the final permit due to concerns regarding the predictability of the weather.

Contractor/Subcontractor Certification of the Storm Water Pollution Prevention Plan

Site operators indicated that they often had difficulty in getting contractors and subcontractors to sign the subcontractor certifications in the previous permit and repeated in the proposed permit. This was a problem for them since the permittee, and not the subcontractor, would be liable for violating the permit if these subcontractor certifications were not signed. Many also felt the certifications were unnecessary since the quality of the storm water and compliance with permit conditions was ultimately the permittee's responsibility anyway.

EPA has addressed the commenters" concern by eliminating the requirement for contractor/subcontractor certification of the pollution prevention plan. EPA also points out that the permittee is responsible for compliance with the terms and conditions of the permit, and that coordination with subcontractors will be necessary to ensure compliance.

Special Conditions, Management Practices, and Other Non-numeric Limitations

Releases in Excess of Reportable Quantities

One commenter requested more specific references to information regarding releases of reportable quantities (RQ) of hazardous substances or oil, and the National Response Center (NRC). All necessary information related to RQ releases and the NRC are contained in the permit, and in 40 CFR Parts 110, 117 and 302. The National Oil and Hazardous Substances Pollution Contingency Plan (also known as the National Contingency Plan (NCP)), found at 40 CFR 300, provides additional information about the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. In addition to the NCP, Regional Contingency Plans (RCP) exist for every Region, and Area Contingency Plans (ACP) may also exist. EPA Regional offices should be contacted directly for copies of available materials. Additional information is available via the Internet at the following web sites for the U.S. National Response Team (NRT) and the NRC: www.nrt.org and www.dot.gov/dotinfo/uscg/hq/nrc.

Another comment was received requesting clarification on which party is responsible for reporting an RQ release where more than one operator (*e.g.* owner and contractor) has received coverage for the same project. The commenter questioned whether both permittees need to report an RQ release. Only one permittee for a project needs to report an RQ release. The permittee with the most direct authority over the spill should make the report. Generally, this will be the permittee with day to day operational control of the construction project (*e.g.* the general contractor).

A further comment requested a permit requirement that permittees report any RQ releases to the operator of the municipal separate storm sewer system in addition to the National Response Center (NRC). The NRC was created under the National Contingency Plan (NCP) and is charged with receiving reports of all chemical, radiological, oil and biological releases regulated by the Clean Water Act. The NRC immediately relays reports to the appropriate State and Federal on-scene coordinators. Depending on the type of release, severity, location and receiving system (soil, air or water), additional local contacts may be notified (*e.g.*, city fire departments or hazardous material teams). EPA believes that this notification process is efficient and effective. Individual municipalities should contact their State or local response departments to request that they be provided information when RQ releases occur to their storm sewer systems.

Standard Permit Conditions

Requiring an Individual Permit

Some commenters recommended that the construction general permit not cover all construction activities and that some activities should be publicly noticed prior to ground-breaking. These commenters were concerned that some construction activities may warrant individual permits.

According to Part VI.L of the proposed permit, "The Director may require any person authorized by this permit to apply for and/or obtain either an individual NPDES permit or an alternative NPDES general permit. Any interested person may petition the Director to take action under this paragraph * * *" However, it is a local land use decision on whether to allow a proposed development project. It is only after the decision to develop has been locally approved and the developer is ready to break ground would the operator(s) need to apply for a permit. Even then, EPA's authority is limited to placing conditions on the discharge of pollutants from the site. The requirement for a permit is therefore not triggered until long after the local land use decision has been made. The Agency encourages interested parties to participate in local public participation opportunities afforded by local land use authorities.

The draft fact sheet had noted in section IV.C that in some situations EPA may require dischargers authorized under the general permit to apply for an individual permit, and that the general permit would continue to apply until the individual permit becomes effective. A commenter argued that if the general permit is inappropriate for a particular project, construction should cease until the individual permit becomes effective. The commenter also objected to the provision allowing an unspecified amount of time to submit the individual application.

NPDES regulations at 40 CFR 122.28(b)(3)(iv) provide that when an individual permit is required for a facility covered by a general permit, the applicability of the general permit terminates upon the effective date of the individual permit. Since the commenter's recommendation is inconsistent with the regulations in this regard, the requested modification was not incorporated into the final permit. The reason for these procedures is to provide the opportunity for public comment on proposals to require individual permits which EPA believes is important in making sound environmental decisions.

With regards to the issue of a deadline for submittal of individual applications, we would again point out the NPDES regulations at 40 CFR 122.28(b)(3)(ii) do not specify such a deadline. A deadline was not included in the final permit due to the wide variety of projects which the general permit would cover, and uncertainties and variations in the amount of time which may be necessary to provide the necessary information. Any request by the director for an individual permit application will specify the deadline for submittal.

Penalties for Non-Compliance

Some commenters argued that the civil and criminal penalties listed in the permit are excessive for residential construction contractors and seemed to be more geared toward large project industrial construction activities. The penalties referenced in the permit are simply the statutory maximums for violations of NPDES permits as established by Congress and required to be included as a standard condition in all NPDES permits (see 40 CFR 122.41(a), as revised). Actual penalties assessed for permit violations in administrative enforcement actions take into account factors such as the economic benefit of avoiding permit compliance, gravity of the violation, and the compliance history of the permittee.

Continued Coverage Under the Permit if it Expires Prior to Reissuance or Replacement

Many parties were frustrated by the seeming unnecessary duplication of effort involved in submission of NOIs, especially because the previous CGP expired prior to reissuance. Permittees were frustrated over having to submit one NOI during the term of the permit (48 hours before construction), a second NOI to be covered by the expired but administratively continued permit (prior to expiration), and a third NOI to obtain coverage under the new permit once issued. To reduce the paperwork and administrative burden, the Agency has reevaluated the notification (reapplication) procedures for effective functioning of general permitting consistent with applicable provisions of the Administrative Procedure Act (APA), 5 U.S.C. 558(c).

Under the APA, if a permittee makes a timely and sufficient application for a renewal or a new permit (in accordance with agency rules), a permit for an activity of a continuing nature does not expire until the application has been finally determined by the agency. Enactment of the APA preceded the development of general or area wide permits to authorize a variety of similar sources. General permits are developed and issued prior to "application" for coverage from individual dischargers. The functional equivalent to an application for coverage under a general permit is the Notice of Intent (NOI). Therefore, EPA general permits have provided for continuing authorization to discharge under an expiring general permit by requiring resubmission of an NOI prior to expiration. The resubmission of the NOI indicated to the Agency that the discharger sought to renew its permit authorization. By operation of law, the authorization to discharge would continue until EPA "finally determined" the renewal application, for example, through affirmative Agency action to make a new general permit available or to require submission of an individual permit application. In reissuing a general permit, however, the Agency may revise permit requirements. Thus, the Agency required reapplication—submission of a new NOI—for dischargers who elect to abide by the terms of that new permit. If the new general permit differed from the previous general permit in important ways, a discharger may elect instead to apply for a individual permit.

For today's general permit, EPA has revised the notification (reapplication) procedures that would apply if the Agency fails to reissue a new general permit prior to expiration of this one. Permittees will no longer be required to file an NOI prior to expiration in order to maintain continuing authorization. Instead, EPA will presume that a permittee who does not file a Notice of Termination (NOT) or an individual permit application seeks continuing authorization to discharge under the expiring permit and intends to abide by the terms of the expiring permit until EPA reissues the permit (or makes an alternative general permit available). EPA believes this procedure is warranted under today's general permit because: (1) The permit requires submission of a NOT to terminate permit coverage: (2) construction activity (prior to final stabilization of land surfaces) lasts for a fixed interval that may extend beyond expiration of the permit: (3) EPA recognizes that circumstances beyond the control of the permittee may result in its failure to obtain "new" permit coverage prior to expiration of this general permit; and (4) the NOI requirements from today's general permit may differ from the general permit that would replace it. EPA notes that general permits for storm water discharges associated with construction activity differ from most all other EPA general permits because only construction general permits require NOTs. Given the finite and limited duration of construction activity which may straddle expiration of the general permit, combined with the requirement for submission of a NOT, EPA believes this procedure provides permittees with permit authorization with reduced paperwork burdens.

The revised notification/reapplication procedures are as follows. First, if the permit is reissued or replaced before the

expiration date, permittees will need to comply with whatever conditions are in the new permit for transitioning from this permit (usually submission of a new NOI). Second, if the permit is not reissued or replaced until after the permit expires, the permit will "continue" in force and effect for those permittees who have submitted an initial NOI but have not yet submitted an NOT or individual permit application. A permittee will remain subject to permit requirements until submission of an NOT. Such permittees remain automatically covered under the expired general permit (and do not need to resubmit an NOI to EPA prior to expiration) until the earliest of: (1) Permit reissuance or replacement; (2) submission of a NOT; (3) issuance of an individual permit for the activity; or (4) the Director issues a formal permit decision not to reissue the permit, at which time permittees must seek coverage under an alternative permit.

Definitions

"Operator"—the Party or Parties That Need To Apply for Permit Coverage

Several commenters requested clarification of the definition of "operator." Others felt that including the definition in the permit was an illegal attempt to make a new regulatory definition without going through the formal rulemaking process. The definition of "operator" is critical, since it is the operator of a discharge of storm water associated with construction activity that is required to obtain coverage under an NPDES permit. See 40 CFR 122.26(c)(1)(ii). The Agency agrees some clarification is appropriate as to how the term "operator" is applied to construction sites. The interpretation of "operator" as it applies to discharges of storm water associated with construction activity is consistent with the statutory and regulatory requirements for permitting of dischargers and does not expand the requirements of permits to anyone who is not already legally required to obtain permits in accordance with the Clean Water Act and existing regulations.

The definition of storm water associated with industrial activity was promulgated November 16, 1990 [55 FR 47990] and is found at 40 CFR 122.26(b)(14). Category (x) of the definition of storm water associated with industrial activity is "construction activity including clearing, grading, and excavation activities except: Operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." In accordance with 40 CFR 122.21(b), "when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." Since the applicability of the "operator" is important to understanding a party's responsibilities under the permit, EPA believes it is critical to inform permittees of the Agency's interpretation of how the regulatory definitions of "owner or operator" and "facility or activity" apply to discharges of storm water associated with construction activity. The definition in the permit is not a formal regulatory definition in and of itself.

In the context of discharges of storm water associated with construction activity, EPA interprets "operator" to mean any party associated with a construction project that meets either of the following two criteria: (1) The party has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or (2) the party has day-to-day operational control of those activities at a project which are necessary to ensure compliance with a storm water pollution prevention plan for the site or other permit conditions (*e.g.*, they are authorized to direct workers at a site to carry out activities required by the storm water pollution prevention plan or comply with other permit conditions). Further, an operator shall be considered to have operational control over all their subcontractors.

EPA wants to make it clear that it does not intend to include under the definition of "operator" individuals who hire a general contractor to construct a home for their personal use (*e.g.*, not those to be sold for profit or used as rental property). EPA believes that the general contractor, being a professional in the building industry, should be the entity rather than the individual who is better equipped to meet the requirements of both applying for permit coverage and developing and properly implementing a SWPPP. However, individuals would meet the definition of "operator" in instances where they performed the general contracting duties for construction of their personal residences.

Crosscutting Issues and Comments Not Directly Related to a Specific Permit Condition

Authority To Regulate Storm Water Discharges Associated With Construction Activity

Several commenters questioned EPA's legal authority to require permits for discharges of storm water associated with construction activity. Some of these commenters noted that EPA only has the authority to regulate the discharge of pollutants.

First, EPA would like to point out that while the proposed permit referred to "discharges," 40 CFR 122.2 defines "discharge" to mean "discharge of pollutants." The final permit has been modified in several places to more clearly reflect that it is the discharge of pollutants that is authorized and regulated by the permit. The regulatory definition of "discharge" has also been added to the permit.

Second, Clean Water Act section 301(a) states "except in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." Section 402(a)(1) authorizes the Administrator to issue permits for the discharge of pollutants. Section 402(p)(2) specifically requires permits for the discharge of storm water associated with industrial activity. The definition of "storm water associated with industrial activity" was promulgated November 16, 1990 (55 FR 47990) and is found at 40 CFR 122.26(b)(14). Category (x) of the definition is "construction activity including clearing, grading, and excavation activities except operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." Therefore, EPA is within its statutory and regulatory authority to require NPDES permits for anyone with operational control over a discharge of pollutants in storm water associated with construction activity.

Public Comment and Public Hearings

Several comments were received stating that EPA did not provide enough time for public comment, and should extend the public comment period to allow for more public input to the permit. In response, EPA notes that it has an obligation under 40 CFR 124.10 to give public notice that a draft permit has been prepared. These regulations require EPA to allow at least 30 days for public comment. EPA went beyond these requirements by allowing 60 days for public comment, due to the level of interest in this permit action. The Agency believes that 60 days was an ample amount of time for all interested parties to submit comments. In order to issue final permit by the time the existing general permit expires, or soon thereafter, EPA kept a restrictive schedule and could not extend the public comment period beyond the specified date of August 1, 1997.

One commenter requested a hearing in Austin, Texas to address issues related to that area of the State. EPA has an obligation under 40 CFR 124.12 to hold public hearings upon finding, on the basis of requests, that a significant public interest exists in a draft permit; or at the Director's discretion for instance, whenever such a hearing might clarify issues involved in the permit decision. Many EPA Regions scheduled public hearings in anticipation of significant public interest. A public hearing was held in Dallas, Texas, and public meetings were held in Houston and Dallas, Texas, and Albuquerque, New Mexico. The Agency believes that the public hearing and meetings in Texas provided ample opportunity for comment on issues related to all areas of Texas. EPA further notes that today's final permit does not include construction projects located in the State of Texas. These projects will be covered under a separate general permit which is currently under development.

Appropriateness of the Permit for Ensuring Protection of Environmental Resources

Several commenters recommended that various requirements of the permit should be strengthened to provide increased protection of environmental resources. Others commenters were unclear regarding certain requirements and requested clarification. Following below is a discussion of the issues and the Agency's responses:

Performance Standards for Post-Construction Storm Water Management

A commenter objected to the lack of more specific criteria in the permit related to post-construction storm water management. For example, it was recommended that post-construction pollutant loadings not exceed 120% of pre-construction loadings. Other recommendations included a requirement for 80% removal of total suspended solids or that post-development peak discharge flows not exceed pre-development peak flows. It was noted that such requirements already exist in some states. Another recommendation was for in-stream turbidity limits (or removal of fines less than 0.85 mm to the greatest extent possible).

These types of permit requirements were also considered when the Baseline Construction General Permit was originally issued in 1992. However, such conditions were not included in that permit to ensure that adequate flexibility was provided considering the large number of States and the variety of geographic areas covered by the permit. EPA continues to believe that adequate flexibility needs to be provided and has not included the types of conditions recommended by the commenter. With regards to the proposed turbidity limits, Part III.D of the permit requires compliance with State water quality standards which should ensure protection of receiving waters.

The commenter also recommended that Part IV.D.2.b.(2) of the draft permit be revised to require velocity dissipation devices at outfalls which genuinely provide non-erosive discharge velocities rather than devices which are ineffective and merely installed for this purpose. EPA agrees that the commenter's recommendation would strengthen and improve the clarity of the permit. The final permit was revised to require velocity dissipation devices which actually provide non-erosive discharge velocities rather than merely installing devices designed for that purpose but are ineffective.

Retaining Sediment and Implementing Permit Requirements to the Maximum Extent Practicable

A commenter noted that Part IV.D.2.a.(1)(a) of the draft permit had included as a goal the retention of sediment on-site to the maximum extent practicable. The commenter recommended that the permit should require that all components of the SWPPP to be implemented to the maximum extent practicable level. The commenter also argued that the objective of retaining sediment on-site is too weak. More specifics should be provided such as retention of sediment via site planning, phasing and other control measures.

EPA disagrees that the term "maximum extent practicable" is necessarily appropriate in conjunction with all other components of the SWPPP. The term was included in Part IV.D.2.a.(1)(a) of the draft permit to provide guidance regarding the overall goal of retention of sediments on the construction site. EPA believes that the existing language elsewhere in the permit appropriately describes the level of effort which is expected for other SWPPP components. EPA is also concerned that the use of the term "maximum extent practicable" in Part IV.D.2.a.(1)(a) of the construction permit may result in confusion since this is the technology-based level of control required by the Clean Water Act for pollutants discharged in storm water from municipal separate storm sewer systems. To avoid potential confusion, the final construction storm water permit uses the term "extent practicable" in Part IV.D.2.a.(1)(a).

EPA also disagrees that specific control measures need to be included in Part IV.D.2.a.(1)(a) of the permit. The purpose of this section of the permit is only to set forth the overall objectives for sediment and erosion control. The permit also includes more specific control measures which are found elsewhere in the permit.

Excluding Coverage Based on Water Quality Concerns of Local Officials

Part I.B.3.d of the draft general permit excludes from coverage discharges which the Director (EPA) determines will cause, or have the reasonable potential to cause excursions above water quality standards. A commenter recommended that the permit be modified to provide that this determination could also be made by local officials who might be more familiar with the discharges than EPA.

EPA believes that the concerns of the commenter can be adequately accommodated by the permit. In situations where a local official believes coverage under the general permit is inappropriate, the official may petition EPA to require an individual permit application. As such, the recommendation of the commenter was not included in the final permit.

Legal Action for Late NOIs

Part II.A.5 of the draft permit (Part II.A.4 of the final permit) notes that the Agency may take enforcement action for unpermitted activities for dischargers who submit late NOIs. A commenter recommended that this section mention that such actions may also be initiated by other parties such as States or private citizens.

While it is true that legal actions may be initiated by interested parties such as private citizens for unpermitted activities, EPA does not believe that this needs to be pointed out in the permit. As such, the final permit was not modified to include this recommendation.

Protection of Habitat for Species in the Receiving Waters

A commenter expressed concern regarding the potential of construction projects to alter existing flow characteristics of the receiving waters and degrade the habitat of aquatic species such as fish in the process. The commenter argued that such degradation is not allowed by antidegradation policy and should not be allowed by the permit.